41 Am. Jur. 2d Indians; Native Americans III A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 130, 140, 141(1), 142(1), 143, 145, 146, 147, 150, 230

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 130, 140, 141(1), 142(1), 143, 145, 146, 147, 150, 230

End of Document

41 Am. Jur. 2d Indians; Native Americans § 21

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 21. Citizenship of Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 147

Native Americans, or Indians, are citizens of the United States, entitled to the same constitutional protections against federal and state action as all citizens.[1] A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe is a national and a citizen of the United States at birth.[2] An Indian born in Alaska on or after March 30, 1867, and prior to June 2, 1924, is a citizen as of the latter date, and an Indian born in Alaska on or after June 2, 1924, is a citizen of the United States at birth.[3]

Pursuant to the 14th Amendment, Indians, as citizens of the United States, are also citizens of the state in which they reside.[4]

The federal statute granting Indians citizenship in the United States is not an unconstitutional attempt to make reservation Indians citizens,[5] does not end the power of Congress to deal with Indians,[6] and is not intended to affect the federal protection of tribal self-government[7] nor to renounce guardianship and jurisdiction over the individual Indians.[8]

Departments and agencies of the United States may not promulgate any regulations or make any determination or decision with respect to federally recognized Indian tribes that classifies, enhances, or diminishes the privileges and immunities available to a tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.[9]

Footnotes

1 U.S. v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011); Luger v. Luger, 2009 ND 84, 765 N.W.2d 523 (N.D. 2009).

2 8 U.S.C.A. § 1401(b), also providing that citizenship does not in any manner impair or otherwise affect the person's right to tribal or other property.

3 8 U.S.C.A. § 1404.

4 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); Luger v. Luger, 2009 ND 84, 765 N.W.2d 523 (N.D. 2009).

5 Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975), aff'd, 429 U.S. 876, 97 S. Ct. 225, 50 L. Ed. 2d 160 (1976).

6 U. S. v. John, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978).

7 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

8 Winton v. Amos, 56 Ct. Cl. 472, 255 U.S. 373, 41 S. Ct. 342, 65 L. Ed. 684 (1921).

9 25 U.S.C.A. § 476(f), (g).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 22

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 22. Protection of property of Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 141(1), 143, 150

The protection guaranteed by the Constitution of the United States to the ownership of private property extends to individual property held by an Indian; an Indian's private rights are secured and enforced to the same extent and in the same way as the rights of other residents or citizens of the United States.[1] The vested property rights of individual Indians are secured and enforced to the same extent and in the same way as equivalent rights of other citizens; however, Congress may alter and condition rights that have not yet vested in individual Indians.[2] The grant of citizenship to Indians born within the territorial limits of the United States does not in any manner impair or otherwise affect the rights of such persons to tribal or other property.[3]

A fund arising from royalties under an oil and gas lease of lands of an Indian allottee is the allottee's individual property and, as such, is within the protective guaranties of the Constitution.[4]

An Indian tribe member is deprived of property without due process of law when the Bureau of Indian Affairs transfers funds from the member's tribal land income fund to repay debts owed to the tribe without affording the member notice and a hearing at which the validity of the debt to the tribe could be determined.[5]

The property rights of tribal members as such are personal rights which cannot be transferred or inherited as members' interests are only derivative of tribe membership.[6] The right of a tribe member to participate in the joint management of a tribal asset is a collective right, not an individual right.[7]

Footnotes

1 Mott v. U.S., 283 U.S. 747, 51 S. Ct. 642, 75 L. Ed. 1385 (1931); Kennerly v. U.S., 721 F.2d 1252 (9th Cir. 1983).
As to Indian lands, generally, see §§ 52 et seq.

2 Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985), judgment aff'd, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987).

3 8 U.S.C.A. § 1401(b).

4 Mott v. U.S., 283 U.S. 747, 51 S. Ct. 642, 75 L. Ed. 1385 (1931).

5 Kennerly v. U.S., 721 F.2d 1252 (9th Cir. 1983).

6 U.S. v. Murdock, 919 F. Supp. 1534 (D. Utah 1996), judgment aff'd, 132 F.3d 534 (10th Cir. 1997).

7 Hackford v. Babbitt, 14 F.3d 1457 (10th Cir. 1994).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 23

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 23. Right of Indians to vote

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 145

Native Americans, or Indians, born within the territorial limits of the United States are declared by statute to be citizens of the United States[1] and are entitled to all the rights and privileges of citizens, including the right of suffrage.[2]

When elections held within a tribe are specific federal elections regulated by a federal statute,[3] the provisions of the 26th Amendment, lowering the voting age to 18 years of age, apply even though contrary to a tribal constitution.[4]

Footnotes

1 § 21.

2 Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (rejected on other grounds by, Carchman v. Korman Corp., 456 F. Supp. 730 (E.D. Pa. 1978)).
Reservation Indians are eligible to vote in state elections. Montoya v. Bolack, 1962-NMSC-073, 70 N.M. 196, 372 P.2d 387 (1962).

3 §§ 16, 23.

4 Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 24

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 24. Capacity of Indians to contract

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 142(1)

An Indian is not under a general legal disability merely by membership in a band that is governed by Indian customs and retains a tribal organization; rather, an Indian has the capacity to contract debts and to make binding personal obligations unless Congress, in the exercise of its power over the Indians, has provided otherwise.[1] Congress, however, possesses the undoubted right to regulate and restrict the right of Indians to contract.[2]

Reminder:

Contracts between Indians and others with respect to Indian lands are subject to federal control.[3]

Footnotes

1 Williams v. First Nat. Bank, 216 U.S. 582, 30 S. Ct. 441, 54 L. Ed. 625 (1910); Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541, 23 N.E. 1080 (1890).

2 Green v. Menominee Tribe of Indians in Wisconsin, 233 U.S. 558, 34 S. Ct. 706, 58 L. Ed. 1093 (1914); Tinker v. Midland Valley Mercantile Co., 231 U.S. 681, 34 S. Ct. 252, 58 L. Ed. 434 (1914).

3 §§ 52 et seq.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 25

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 25. Capacity of Indians to sue or defend against suit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 230

Indians are entitled, as any other persons, to bring actions in a federal or state court and may do so in their own name.[1] In bringing a suit in a state court, an Indian is subject to the same laws, relating to the prosecution of suits, that govern any citizen of the state, including the statute of limitations.[2]

Footnotes

1 Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968).

2 Seneca Nation of Indians v. Christy, 162 U.S. 283, 16 S. Ct. 828, 40 L. Ed. 970 (1896).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 26

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 26. Preferential treatment of Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 130

A.L.R. Library

What constitutes reverse or majority race or national origin discrimination violative of Federal Constitution or statutes—nonemployment cases, 152 A.L.R. Fed. 1

Legislative enactments according special treatment to Indians in fulfillment of the unique obligation of Congress to the Indians should not be disturbed on a constitutional basis if rationally based.[1] The unique legal status of Indians under federal law permits the federal government to enact legislation singling out tribal Indians, which might otherwise be constitutionally offensive, but states do not enjoy the same unique relationship with Indians.[2] For purposes of constitutional equal protection scrutiny, "Indian" is not a racial classification but a political one.[3] Federal statutes with respect to Indians, relating to Indians as such, are not based on impermissible racial classifications.[4]

Observation:

A State Indian Arts and Crafts Act imposing penalties for selling Indian-style goods in a manner that falsely suggests that the goods are Indian made is rationally related, under equal protection principles, to a legitimate government interest.[5]

Footnotes

1 Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977); Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).

2 Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

3 Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).

4 American Federation of Government Employees, AFL-CIO v. U.S., 330 F.3d 513 (D.C. Cir. 2003).

5 American Federation of Government Employees, AFL-CIO v. U.S., 330 F.3d 513 (D.C. Cir. 2003); Native American Arts, Inc. v. Contract Specialties, Inc., 754 F. Supp. 2d 386, 62 A.L.R. Fed. 2d 759 (D.R.I. 2010).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 27

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 27. Preferential treatment of Indians—Employment preferences

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 130, 146

A.L.R. Library

What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases, 168 A.L.R. Fed. 1

What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases, 150 A.L.R. Fed. 1

Pursuant to various federal statutory authorizations, Indians are given preference for certain public employment,[1] including employment in the Bureau of Indian Affairs under what is termed the Indian Preference Act (IPA),[2] provided tribal membership requirements are met.[3]

Reliance on the statutory Indian public employment preference does not constitute invidious racial discrimination in violation of due process since the preference is reasonable and rationally designed to further Indian self-government;[4] it does not constitute race, national origin, or gender discrimination as a matter of law.[5]

Exceptions to the preference for public employment granted by the IPA may not be made for administrative or management reasons, whether exceptional or not.[6] In general, it is an abuse of discretion for an agency to continue to apply generally applicable Civil Service standards to Indians in violation of the IPA,[7] but the IPA does not impose an absolute obligation on the

Secretary of the Interior to establish special standards for evaluating the qualifications of Indian applicants to every position, and the Secretary may rely on Civil Service qualification standards for the position if, after giving full weight to the unique experience and background of Indians, the Secretary concludes that the only proper qualifications for the position are those that have already been adopted as part of the Civil Service regulations.[8]

The failure of the Department of the Interior to apply the Indian preference provision to all positions in the Department that directly and primarily relate to providing services to Indians is unlawful.[9]

The IPA does not create a private right of action, nor a remedy, for an individual Indian.[10] However, an Indian denied an employment position has standing to challenge the Secretary's use of Civil Service criteria to evaluate the qualifications of Indian job applicants, as well as standing to challenge the Secretary's failure to promulgate separate, independent standards for Indians in violation of the IPA.[11]

Observation:

Title VII of the Civil Rights Act, proscribing unlawful employment discrimination, expressly exempts any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of the business or enterprise under which a preferential treatment is given to any individual because the individual is an Indian living on or near a reservation.[12] The exemption is rationally based on a political classification, not racial or national origin, and serves to remedy past and present discrimination against Indians as a minority group and is designed to protect existing or future preference programs.[13]

Footnotes

1 25 U.S.C.A. §§ 44 to 47.

2 25 U.S.C.A. § 472.
As to regulations on Indian employment preferences, see 25 C.F.R. §§ 5.1 et seq.
The statute's reference to the "Indian Office" is broadly construed by the Interior Department to include all units in the Department directly and primarily related to the providing of services to Indians. Indian Educators Federation Local 4524 of American Federation of Teachers, AFL-CIO v. Kempthorne, 541 F. Supp. 2d 257 (D.D.C. 2008), subsequent determination, 590 F. Supp. 2d 15 (D.D.C. 2008).

3 Adams v. Morton, 581 F.2d 1314, 26 Fed. R. Serv. 2d 33 (9th Cir. 1978); Mullenberg v. U.S., 857 F.2d 770 (Fed. Cir. 1988).

4 Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

5 Prunier v. Norton, 468 F. Supp. 2d 1344 (D.N.M. 2006).

6 Freeman v. Morton, 499 F.2d 494 (D.C. Cir. 1974).

7 Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979); Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984).

8 Johnson v. Shalala, 35 F.3d 402 (9th Cir. 1994).

9 Indian Educators Federation Local 4524 of American Federation of Teachers, AFL-CIO v. Kempthorne, 541 F. Supp. 2d 257 (D.D.C. 2008), subsequent determination, 590 F. Supp. 2d 15 (D.D.C. 2008).

10 Indian Educators Federation Local 4524 of American Federation of Teachers, AFL-CIO v. Kempthorne, 590 F. Supp. 2d 15 (D.D.C. 2008); Beams v. Norton, 327 F. Supp. 2d 1323 (D. Kan. 2004), decision aff'd, 141 Fed. Appx. 769 (10th Cir. 2005).

11 Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984).

12 42 U.S.C.A. § 2000e-2(i).

13 E.E.O.C. v. Peabody Western Coal Co., 773 F.3d 977 (9th Cir. 2014).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 28

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

A. In General

§ 28. Education of Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 130, 140

Various federal statutes address the education of Native American children, or Indian children, including the Indian Self-Determination and Education Assistance Act,[1] the Bureau of Indian Affairs funded school system,[2] the Tribally Controlled Schools Act,[3] the tribal colleges and universities program,[4] and other provisions[5] and regulations.[6]

Observation:

While the separate classification and treatment of Indians is constitutionally permissible in certain contexts in light of the unique status of Indians in the country, and in light of history and public policy, there is no basis for exempting a public school from otherwise applicable racial desegregation requirements solely because the school district population contains a substantial number of Indian students.[7] Indian children are not exempt from compliance with a public school assignment plan pursuant to a federal law mandate.[8]

CUMULATIVE SUPPLEMENT

Cases:

The Indian Self-Determination and Education Assistance Act (ISDEAA) provides no specific procedure for determining the amount of indirect contract support costs (CSCs) a tribal contractor will incur related to a particular program in a given year. 25 U.S.C.A. § 5325(a)(2), (a)(3)(A). Seminole Tribe of Florida v. Azar, 376 F. Supp. 3d 100 (D.D.C. 2019).

[END OF SUPPLEMENT]

Footnotes

1 25 U.S.C.A. §§ 450 et seq.
2 25 U.S.C.A. §§ 2000 et seq.
3 25 U.S.C.A. §§ 2501 et seq.
4 42 U.S.C.A. § 1862p-13.
5 25 U.S.C.A. §§ 271 et seq.
6 25 C.F.R. §§ 30.100 to 47.12.
7 Booker v. Special School Dist. No. 1, Minneapolis, Minn., 585 F.2d 347 (8th Cir. 1978).
8 State v. Chavis, 45 N.C. App. 438, 263 S.E.2d 356 (1980).

41 Am. Jur. 2d Indians; Native Americans III B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

B. Indian Civil Rights Act

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 126, 213

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 126, 213

End of Document

41 Am. Jur. 2d Indians; Native Americans § 29

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

B. Indian Civil Rights Act

§ 29. General provisions and effect of Indian Civil Rights Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 126, 213

The Indian Civil Rights Act (ICRA),[1] incorporating the Indian Bill of Rights (IBR),[2] imposes upon Indian tribal governments, in the exercise of the power of self-government, certain constitutional restrictions applicable to the federal and state governments, with certain exceptions,[3] and includes specific provisions applicable in tribal criminal proceedings and in the imposition of penalties or punishments.[4] The IBR imposes no restrictions on Congress in legislating with respect to Indian tribes nor on the Secretary of the Interior in exercising the power given to the Secretary by Congress with respect to Indian tribes and their affairs.[5]

Observation:

The constitutional validity of the ICRA has been upheld against a variety of challenges,[6] with particular recognition of the power of Congress to so act pursuant to the Indian Commerce Clause and the Treaty Clause.[7] That the ICRA singles out Indians for particular and special treatment does not amount to discrimination in violation of equal protection or due process since the treatment is tied rationally to the fulfillment of Congress' unique obligation to the Indians.[8]

In enacting the ICRA, Congress sought to apply some basic constitutional norms to tribal governments, in the form of restrictions similar to those contained in the United States Constitution's Bill of Rights and the 14th Amendment.[9] However, the ICRA is not coextensive with the Federal Bill of Rights,[10] and not all federal constitutional restraints are imposed under the ICRA.[11] The legislative history of the ICRA makes it clear that Congress intended that it not incorporate the provisions of the 15th Amendment; certain procedural provisions of the Fifth, Sixth, and Seventh Amendments; and, in some respects, the equal-protection requirement of the 13th and 14th Amendments.[12]

With respect to unlawful employment practices, Title VII of the Civil Rights Act of 1964 provides that it does not apply to Indian tribes,[13] and this specific provision prevails over more general civil rights provisions in the Indian Civil Rights Act.[14]

CUMULATIVE SUPPLEMENT

Cases:

The Indian Civil Rights Act (ICRA) accorded a range of procedural safeguards to tribal-court defendants similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. U.S.C.A. Const.Amend. 14; 25 U.S.C.A. § 1301et seq. U.S. v. Bryant, 136 S. Ct. 1954 (2016).

The right to counsel under the Indian Civil Rights Act (ICRA) is not coextensive with the Sixth Amendment right. U.S.C.A. Const.Amend. 6; Indian Civil Rights Act of 1968, § 202(a)(6), (c)(1, 2), 25 U.S.C.A. § 1302(a)(6), (c)(1, 2). U.S. v. Bryant, 136 S. Ct. 1954 (2016).

In tribal court, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel. U.S.C.A. Const.Amend. 6; Indian Civil Rights Act of 1968, § 202(a)(6), 25 U.S.C.A. § 1302(a)(6). U.S. v. Bryant, 136 S. Ct. 1954 (2016).

[END OF SUPPLEMENT]

Footnotes

1 25 U.S.C.A. §§ 1301 et seq.

2 25 U.S.C.A. § 1302(a).

3 Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014).

4 § 125.

5 Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).
ICRA does not operate against the federal government. California Valley Miwok Tribe v. Salazar, 967 F. Supp. 2d 84 (D.D.C. 2013), appeal dismissed, 2014 WL 1378758 (D.C. Cir. 2014).

6 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005); Morris v. Tanner, 288 F. Supp. 2d 1133 (D. Mont. 2003), judgment aff'd, 160 Fed. Appx. 600 (9th Cir. 2005).

7 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).

8 Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

9 Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014).

Many of the same protections are afforded by statute as would be provided as a matter of federal constitutional law. Alexander v. Salazar, 739 F. Supp. 2d 1333 (E.D. Okla. 2010).

The ICRA secures constitutional rights to the American Indian, as afforded to other Americans, protecting them from arbitrary and unjust actions of tribal governments. People v. Ramirez, 148 Cal. App. 4th 1464, 56 Cal. Rptr. 3d 631 (3d Dist. 2007).

10 Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005); U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).

11 Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

12 Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

13 42 U.S.C.A. § 2000e(b)(1).

14 Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 30

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

B. Indian Civil Rights Act

§ 30. Right of action under Indian Civil Rights Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 126, 213

The Indian Civil Rights Act (ICRA)[1] does not authorize private actions for declaratory or injunctive relief against either the tribe or its officers[2] nor actions for damages to enforce its substantive provisions;[3] actions against the tribe under the ICRA are barred by tribal sovereign immunity.[4] Other than in habeas corpus actions,[5] tribal forums must be utilized to vindicate rights created by the ICRA.[6]

Practice Tip:

A defendant in a tribe's federal court action to exclude the defendant from its reservation could assert a violation of the ICRA as a defense, without infringing the tribe's sovereign immunity, inasmuch as the tribe was not thereby subjected to suit, and the tribal court forum was not available to the defendant because the tribe bypassed the tribal court and chose to bring its action in federal court.[7]

CUMULATIVE SUPPLEMENT

Cases:

Complaint by arrestee who was not a member of an Indian tribe against tribal officers in their official capacities in federal court to remedy alleged Indian Civil Rights Act (ICRA) violations regarding arrest and detention while traveling on federally-maintained highway on reservation land did not state an Indian Civil Rights Act (ICRA) claim; there is no implied private right of action against tribal officers in federal court to remedy alleged ICRA violations, other than the habeas corpus provisions. 25 U.S.C.A. §§ 1302, 1303. Stanko v. Oglala Sioux Tribe, 916 F.3d 694 (8th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 29.

2 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014).
The ICRA does not provide a basis for a due process claim. Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185 (9th Cir. 1998).

3 Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004); Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139 (10th Cir. 2004).

4 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013).
As to tribal sovereign immunity, generally, see § 11.

5 §§ 30, 31.

6 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009).

7 Santa Ynez Band of Mission Indians v. Torres, 262 F. Supp. 2d 1038 (C.D. Cal. 2002).

41 Am. Jur. 2d Indians; Native Americans § 31

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

III. Basic Rights of Indians as Individuals

B. Indian Civil Rights Act

§ 31. Habeas corpus under Indian Civil Rights Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 126, 213

Although civil actions against a tribe or its officers in the federal courts are not authorized under the Indian Civil Rights Act (ICRA),[1] the privilege of the writ of habeas corpus is available to any person, in a United States court, to test the legality of the person's detention by order of an Indian tribe.[2]

Habeas corpus is the exclusive means for federal court review of tribal criminal proceedings,[3] and the exclusive remedy for the enforcement of the ICRA in federal court,[4] but is not a general waiver of the tribe's sovereign immunity.[5]

Tribal remedies must ordinarily be exhausted before a habeas corpus claim is asserted in federal court,[6] but the requirement is not inflexible[7] and is subject to waiver by the tribe by failure to raise the defense or by strategically withholding it or intentionally relinquishing it.[8] The plaintiff need not exhaust state remedies by first seeking relief in state court.[9]

Observation:

The detention requirement for habeas corpus relief under the ICRA must be satisfied to afford the court jurisdiction, requiring severe actual or potential restraint of liberty.[10] Detention under the ICRA is interpreted as "in custody" as in other habeas contexts and is not established by a mere denial of access to certain tribal facilities, nor by continuing threats of banishment or exclusion as nonmembers of the tribe, nor by actual disenrollment from the tribal membership.[11] The requirement is not satisfied by a mere economic restraint[12] as by the revocation of a vendor permit[13] or by the imposition of a fine.[14]

The relief affordable to a petitioner under habeas corpus is limited by the constitutional rights afforded the petitioner under the tribe's constitution if not otherwise guaranteed by the ICRA.[15]

Footnotes

1 §§ 29, 30.

2 25 U.S.C.A. § 1303.

3 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004); Frazier v. Turning Stone Casino, 254 F. Supp. 2d 295 (N.D. N.Y. 2003).

4 Alvarez v. Tracy, 773 F.3d 1011 (9th Cir. 2014); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013).

5 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013); Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, 692 F.3d 1200 (11th Cir. 2012), cert. denied, 133 S. Ct. 843, 184 L. Ed. 2d 654 (2013).

6 Alvarez v. Tracy, 773 F.3d 1011 (9th Cir. 2014); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013); Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, 187 L. Ed. 2d 49 (2013).

7 Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation, 554 F.2d 845 (8th Cir. 1977); U. S. ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974).
Exhaustion is not required when tribal remedies do not exist. Sweet v. Hinzman, 634 F. Supp. 2d 1196 (W.D. Wash. 2008).
Exhaustion is not required of nonmember. Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) (overruled on other grounds by, U.S. v. Enas, 255 F.3d 662 (9th Cir. 2001)); In re Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004).

8 Alvarez v. Tracy, 773 F.3d 1011 (9th Cir. 2014).

9 Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation, 554 F.2d 845 (8th Cir. 1977).

10 Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004); Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010).

11 Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010).
There is authority that an allegation of banishment from the tribe is sufficient to state a claim under the habeas corpus provision of the ICRA. Sweet v. Hinzman, 634 F. Supp. 2d 1196 (W.D. Wash. 2008).

12 Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004).

13 Walton v. Tesuque Pueblo, 443 F.3d 1274 (10th Cir. 2006).

14 Moore v. Nelson, 270 F.3d 789 (9th Cir. 2001).

15 Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

End of Document

41 Am. Jur. 2d Indians; Native Americans IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 106, 113, 116, 120, 237, 240, 243
West's Key Number Digest, Internal Revenue 3570, 4203.20, 4246, 4305, 4312, 4320

A.L.R. Library

A.L.R. Index, Indians
A.L.R. Index, Preemption
A.L.R. Index, Taxation
West's A.L.R. Digest, Indians 106, 113, 116, 120, 237, 240, 243
West's A.L.R. Digest, Internal Revenue 3570, 4203.20, 4246, 4305, 4312, 4320

End of Document

41 Am. Jur. 2d Indians; Native Americans § 32

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

1. In General

§ 32. Plenary and exclusive federal power in Indian matters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106

A.L.R. Library

Application of Indian Reorganization Act, 30 A.L.R. Fed. 2d 1
Validity and Construction of Indian Reorganization Act, 28 A.L.R. Fed. 2d 563

The Commerce Clause of the United States Constitution expressly authorizes Congress to regulate commerce with the Indian tribes.[1] The authority of Congress over Indians and Indian matters is plenary,[2] and generally not subject to judicial control,[3] unless its exercise of discretion is purely arbitrary,[4] but judicial scrutiny for a rational basis is afforded.[5]

The authority of the federal government over relations with the Indian tribes is exclusive.[6]

Observation:

Federal laws of general applicability are presumed to apply with equal force to Indian tribes[7] except that a federal statute of general applicability that is silent on the issue of Native Americans will not apply to them if (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.[8]

CUMULATIVE SUPPLEMENT

Cases:

It is no matter how many other promises to a tribe the federal government has already broken, if Congress wishes to break the promise of a reservation, it must say so. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Federal law generally governs in Indian country. U.S. v. Bryant, 136 S. Ct. 1954 (2016).

Post-audit interpretation of regulation under Native American Housing Assistance and Self-Determination Act (NAHASDA) disqualifying block grant funding for housing units that were no longer owned or operated by tribal housing authority, which excluded all homes past their initial 25-year lease period from tribe's Formula Current Assisted Housing Stock (FCAS) calculation, was arbitrary and capricious as applied to tribe, since regulation spoke in terms of whether tribe had "legal right to own, operate or maintain the unit," and tribes maintained legal right to own, operate, or maintain unit until it actually was conveyed, among other things. Native American Housing Assistance and Self-Determination Act of 1996, §§ 302, 401, 405, 25 U.S.C.A. §§ 4152, 4161, 4165; 24 C.F.R. § 1000.318. Housing Authority of Te-Moak Tribe of Western Shoshone Indians v. U.S. Dept. of Housing and Urban Development, 85 F. Supp. 3d 1213 (D. Nev. 2015).

Issuance of preliminary injunction exempting tribe during pendency of challenge from large employer mandate in Patient Protection and Affordable Care Act (ACA), which required a large employer to sponsor a health insurance plan meeting certain minimum requirements for its full-time employees or face an "assessable payment" if it failed to do so, would be adverse to the public interest; injunction would interfere with Congress's intent in passing the ACA's large employer mandate, as part of ACA's goal was to increase the number of Americans covered by health insurance, and if a preliminary injunction were issued, non-Indian employees would be subject to individual mandate, yet their employer, a large employer employing far more than 50 full-time employees, would be exempt from offering them a health insurance plan. 26 U.S.C.A. § 4980H. Northern Arapaho Tribe v. Burwell, 90 F. Supp. 3d 1238 (D. Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. I, § 8, cl. 3.

2 Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); U.S. v. Jicarilla Apache Nation, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011).
Congressional legislative authority in Indian matters is supreme. U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).

Congressional powers respecting Indians are broad. People v. Collins, 298 Mich. App. 166, 826 N.W.2d 175 (2012); State v. Kostick, 755 S.E.2d 411 (N.C. Ct. App. 2014), review denied, 367 N.C. 508, 758 S.E.2d 872 (2014).

3 South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

4 Perrin v. U.S., 232 U.S. 478, 34 S. Ct. 387, 58 L. Ed. 691 (1914).

5 Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977); Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

6 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985); Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985).

7 U.S. v. Smiskin, 487 F.3d 1260 (9th Cir. 2007).

8 Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009); U.S. v. Fox, 573 F.3d 1050 (10th Cir. 2009).

There must be a clear and plain congressional intent through an express declaration in the statute, legislative history, or surrounding circumstances. N.L.R.B. v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858 (D. Minn. 2010).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 33

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

1. In General

§ 33. Department of Interior

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 113, 116

The Department of the Interior is vested by Congress with general control over the affairs of the Indians,[1] including authority to manage all Indian affairs and all matters arising out of Indian relations, as well as authority to promulgate regulations having the force and effect of law,[2] and responsibility for the welfare of Indian tribes; the Secretary of the Interior has reasonable powers to discharge that responsibility effectively.[3] The Secretary is charged with the supervision of public business related to Indians.[4] The Secretary has an overriding duty to deal fairly with Indians, and this duty necessarily constrains the Secretary's discretion to order priorities.[5]

The Indian Reorganization Act (IRA),[6] authorizing the Secretary to acquire any interest in lands within or without existing reservations for the purpose of providing land for Indians, does not violate the nondelegation doctrine.[7] The Secretary's authority to acquire land and hold it in trust for the Indians is limited by the IRA to Indian tribes under federal jurisdiction at the time of the enactment.[8]

CUMULATIVE SUPPLEMENT

Cases:

Department of Interior's (DOI) finding that Tribe's removal of chairman of Tribe's governing committee was in retaliation for chairman's disclosure of suspected misuse of federal funds provided to Tribe under American Recovery and Reinvestment Act (ARRA) and that Tribe's proffered reasons for removing chairman were pretextual was not arbitrary or capricious; although

Tribe provided seven alternative justifications for its decision to remove chairman, including his alleged improper removal of tribal judge and verbal and sexual harassment of tribal employees, Tribe lacked any contemporaneous evidence documenting the discovery of the alleged wrongdoing or any timely, formal process and procedure to investigate and adjudicate the allegations. Pub. L. No. 111-5, § 3, 123 Stat. 115. Chippewa Cree Tribe of Rocky Boy's Reservation, Montana v. U.S. Department of Interior, 900 F.3d 1152 (9th Cir. 2018).

Department of Interior's determination that Indian tribe was "under Federal jurisdiction" when Indian Reorganization Act (IRA) was passed, such that tribe was entitled to IRA benefits, was not arbitrary and capricious, where federal government had made efforts to purchase land for tribe for approximately a century, beginning before IRA was passed, and efforts to purchase land failed due to problems securing valid title to land and stubbornness of government's negotiating partners, not because of lack of will on part of government. 25 U.S.C.A. §§ 5108, 5129. County of Amador v. United States Department of the Interior, 872 F.3d 1012 (9th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S. ex rel. Lowe v. Fisher, 223 U.S. 95, 32 S. Ct. 196, 56 L. Ed. 364 (1912); Ballinger v. U.S. ex rel. Frost, 216 U.S. 240, 30 S. Ct. 338, 54 L. Ed. 464 (1910).

2 Cherokee Nation of Oklahoma v. Norton, 241 F. Supp. 2d 1374 (N.D. Okla. 2002).

3 Robinson v. Salazar, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), appeal dismissed, (9th circ. 12-17151) (Feb. 26, 2013).
Congress has delegated sweeping authority to the Secretary in interpreting and administering laws governing Indian tribes. Oregon v. Norton, 271 F. Supp. 2d 1270 (D. Or. 2003).

4 43 U.S.C.A. § 1457.

5 Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

6 § 5.

7 County of Charles Mix v. U.S. Dept. of Interior, 674 F.3d 898 (8th Cir. 2012).

8 Carcieri v. Salazar, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 34

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

1. In General

§ 34. Bureau of Indian Affairs; Commissioner of Bureau

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 113, 116

Congress has established the Bureau of Indian Affairs within the Department of the Interior, under the direction of the Commissioner of Indian Affairs[1] and subject to the delegation of duties and responsibilities by the Secretary of the Interior.[2] The Commissioner, under the direction of the Secretary, manages all Indian affairs and all matters arising out of Indian relations.[3] The Bureau has broad power to carry out the federal government's unique responsibilities with respect to Indians[4] and may be charged by the Secretary with a broad range of law enforcement powers.[5]

Footnotes

1 25 U.S.C.A. §§ 1 et seq.
2 25 U.S.C.A. § 1a.
3 25 U.S.C.A. § 2.
4 California Valley Miwok Tribe v. Jewell, 2014 WL 1378758 (D.C. Cir. 2014).
5 U.S. v. Roy, 408 F.3d 484, 67 Fed. R. Evid. Serv. 346, 19 A.L.R. Fed. 2d 773 (8th Cir. 2005).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 35

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

2. Particular Matters

§ 35. Federal taxation of Indian income and transactions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Internal Revenue 3570, 4203.20, 4246, 4305, 4312, 4320

Native Americans, or Indians, like all other citizens, are subject to federal excise tax[1] and federal income tax unless some provision of a statute or treaty expressly and specifically confers an exemption.[2] Native American heritage is not a federal tax exempt status.[3] An exemption applicable to a tribal entity does not apply to an individual Indian's income from that entity.[4]

No provision in a tribal constitution can limit the taxing power of the United States.[5]

Observation:

Congress has unambiguously intended for the word "person," as used in the Internal Revenue Code, to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties.[6]

The Indian General Allotment Act (IGAA)[7] impliedly exempts Indians from federal gift tax[8] and federal capital-gains tax on the proceeds from allotted land until a patent in fee is issued[9] but does not exempt from excise tax the sale of a commodity that

merely takes place on the allotted Indian land.[10] The IGAA does not provide a tax exemption for income that an Indian derives from land held in trust for other Indians or for the tribe,[11] or for the income of a tribal chairperson, derived from reservation land reserved for allotment but not actually allotted.[12] Income from products grown or contained within Indian trust land is exempted from federal excise tax while income from businesses located on trust land is taxable.[13] Restrictions on the alienation of land owned by an Indian do not constitute tax exemptions for revenue generated from leases of the land.[14]

CUMULATIVE SUPPLEMENT

Cases:

Tribal gaming revenue distributions to member of Indian tribe did not derive from tribal land, and, thus, were not exempt from federal income taxation under IGRA on such basis, since tribal casino did not generate income from use of reservation land or resources of land, rather, income from casino came from investment in improvements on land and business activities related to such assets. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(b)(1); 25 U.S.C.A. § 5506; Pub. L. No. 105-83, 111 Stat. 1624. United States v. Jim, 891 F.3d 1242 (11th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Chickasaw Nation v. U.S., 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001); Little Six, Inc. v. U.S., 280 F.3d 1371 (Fed. Cir. 2002).
Excise tax exemptions apply to certain handcraft Indian articles but do not apply to an Indian corporation's manufactured tobacco products. King Mountain Tobacco Co., Inc. v. Alcohol and Tobacco Tax and Trade Bureau, 996 F. Supp. 2d 1061 (E.D. Wash. 2014).

2 Campbell v. C.I.R., 28 Fed. Appx. 613 (8th Cir. 2002); Barrett v. U.S., 561 F.3d 1140 (10th Cir. 2009).
A treaty provision for free use and enjoyment of Indian lands, predating the income tax laws, does not provide a basis for tax exempt status. Lazore v. C.I.R., 11 F.3d 1180 (3d Cir. 1993).
The Indian Reorganization Act, 25 U.S.C.A. §§ 465, 466, 476, does not provide an exemption from federal income taxation. U.S. v. Anderson, 625 F.2d 910 (9th Cir. 1980).
As to federal taxation, generally, see Am. Jur. 2d, Federal Taxation.

3 U.S. v. John, 291 F. Supp. 2d 230 (W.D. N.Y. 2003).

4 Allen v. C.I.R., 204 Fed. Appx. 564 (7th Cir. 2006).

5 U.S. v. Anderson, 625 F.2d 910 (9th Cir. 1980).

6 Chickasaw Nation v. U.S., 208 F.3d 871 (10th Cir. 2000), judgment aff'd, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

7 25 U.S.C.A. §§ 334 et seq.

8 Kirschling v. U.S., 746 F.2d 512 (9th Cir. 1984).

9 Squire v. Capoeman, 351 U.S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

10 Cook v. U.S., 86 F.3d 1095 (Fed. Cir. 1996).

11 U.S. v. Anderson, 625 F.2d 910 (9th Cir. 1980).
Payments received by Native American taxpayers from their tribe, representing profits from a tribal casino, were subject to federal income tax, whether the casino was on allotted or tribal land. Doxtator v. C.I.R., T.C. Memo. 2005-113, T.C.M. (RIA) P 2005-113 (2005).

12 Jourdain v. C. I. R., 617 F.2d 507 (8th Cir. 1980).

13 King Mountain Tobacco Co., Inc. v. Alcohol and Tobacco Tax and Trade Bureau, 923 F. Supp. 2d 1280 (E.D. Wash. 2013).

14 Bruner v. U.S., 159 Fed. Appx. 859 (10th Cir. 2005).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 36

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

2. Particular Matters

§ 36. Federal regulation of Indian commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 120

Under the Constitution of the United States, the power to regulate commerce with the Indian tribes is expressly vested in Congress.[1] The "Indian Commerce Clause" grants Congress broad power,[2] as free from restrictions as the power to regulate commerce with foreign nations,[3] and generally provides the basis for federal preemption of state authority over commercial activity on Indian reservations.[4]

Traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress even though it is within the limits of a state, the power of Congress being superior and paramount to the authority of any such state within whose limits are Indian tribes.[5] As long as the Indians remain a distinct people, with existing tribal organizations, recognized by the political department of the government, Congress has the power to say with whom and on what terms they will deal and what articles will be contraband.[6]

Major areas of congressional action regarding Indian commerce relate to matters involving Indian lands;[7] Indian gaming;[8] hunting, fishing, and wildlife;[9] and minerals, oil and gas, and timber.[10]

Observation:

Numerous congressional enactments provide for the promotion of Indian and tribal economic development,[11] including, but not limited to, the Indian Revolving Loan Fund,[12] Indian Loan Guaranties and Insurance,[13] Indian Business Grants,[14] and the Native American Business Development, Trade Promotion, and Tourism Act.[15]

Caution:

A federal statute provides that, on penalty of forfeiture and financial penalty, it is unlawful for any person other than a full-blooded Indian to trade with Indians without an Indian trader license, subject to exceptions for particular tribes,[16] applicable to nonresident persons who sell goods to Indians on the reservation.[17]

CUMULATIVE SUPPLEMENT

Statutes:

The Native American Tourism and Improving Visitor Experience Act (25 U.S.C.A. §§ 4351 to 4355), added effective September 23, 2016, enacts provisions to enhance and integrate Native American tourism (25 U.S.C.A. § 4353), to increase coordination and collaboration between federal tourism assets to support Native American tourism and bolster recreational travel and tourism; to expand heritage and cultural tourism opportunities (25 U.S.C.A. § 4354) in the United States to spur economic development, create jobs, and increase tourism revenues, and to provide related grants, loans, and technical assistance.

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. I, § 8, cl. 3.

2 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174, 5 Ed. Law Rep. 120 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).

3 Perrin v. U.S., 232 U.S. 478, 34 S. Ct. 387, 58 L. Ed. 691 (1914).

4 Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174, 5 Ed. Law Rep. 120 (1982).
As to federal preemption of state law in particular contexts, see §§ 41, 42.

5 U.S. v. Jackson, 280 U.S. 183, 50 S. Ct. 143, 74 L. Ed. 361 (1930).

6 Perrin v. U.S., 232 U.S. 478, 34 S. Ct. 387, 58 L. Ed. 691 (1914); Tinker v. Midland Valley Mercantile Co., 231 U.S. 681, 34 S. Ct. 252, 58 L. Ed. 434 (1914).

7 §§ 52 et seq.

8 § 37.

9 §§ 58 et seq.

10 §§ 62 et seq.

11 25 U.S.C.A. §§ 1451 et seq.

12 25 U.S.C.A. §§ 1461 et seq.; 25 C.F.R. §§ 101.1 et seq.

13 25 U.S.C.A. §§ 1481 et seq.; 25 C.F.R. §§ 103.1 et seq.

14 25 U.S.C.A. §§ 1521 et seq.

15 25 U.S.C.A. §§ 4301 et seq.

The Act establishes the Office of Native American Business Development. 25 U.S.C.A. § 4303.

As to regulations on the Indian Business Development Program, see 25 C.F.R. §§ 286.1 et seq.

16 25 U.S.C.A. § 264.

Proper persons will be permitted to trade with Indians under rules and regulations prescribed by the Commissioner of Indian Affairs. 25 U.S.C.A. § 262.

The President has the authority to prohibit trade with Indians and to revoke all licenses to trade with Indians. 25 U.S.C.A. § 263.

17 Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 100 S. Ct. 2592, 65 L. Ed. 2d 684 (1980).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 37

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

2. Particular Matters

§ 37. Federal regulation of Indian gaming

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 330 to 343

A.L.R. Library

Preemption of State Law by Indian Gaming Regulatory Act, 27 A.L.R. Fed. 2d 93
Construction and Application of "Restoration of Lands" Provision of Indian Gaming Regulatory Act, 25 U.S.C.A. sec 2719(b)(1)(B)(iii), 3 A.L.R. Fed. 2d 359
Interplay Between Indian Gaming Regulatory Act and Johnson Act, 2 A.L.R. Fed. 2d 241
Validity of Indian Gaming Regulatory Act, 200 A.L.R. Fed. 367
Jurisdiction Issues Arising Under Indian Gaming Regulatory Act, 197 A.L.R. Fed. 459

Forms

Am. Jur. Pleading and Practice Forms, Indians, American § 36 (Complaint in federal court—For declaratory and injunctive relief—To prevent development of casino on remote land acquired by Indian nation)

Federal Procedural Forms § 41:68.50 (Motion to intervene—In action under Indian Reorganization Act—To take tribal land into trust under Indian Gaming Regulatory Act [25 U.S.C.A. §§ 465, 2719; Fed. R. Civ. P. 24])

The Indian Gaming Regulatory Act (IGRA)[1] has the purpose of promoting tribal economic development and self-sufficiency,[2] providing a statutory basis for the operation and regulation of gaming by Indian tribes.[3] The IGRA provides that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.[4] It represents a balance struck by Congress among the interests of tribal governments and the states[5] and creates a cooperative federal-state-tribal scheme for regulation of gaming hosted by federally recognized Indian tribes on Indian land, allowing states a limited and closely defined role in the process and limiting the conditions under which tribes are allowed to enter into gaming.[6] State regulation or prohibition of gaming activities on Indian lands is preempted but not state regulations or prohibitions on non-Indian lands.[7]

The IGRA divides gaming on Indian lands into three classes and provides a different regulatory scheme for each class.[8] Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and is not subject to regulation under the IGRA.[9] Class II games are permitted on Indian lands under the IGRA, and regulated thereunder, if the game is conducted within a state that permits Class II gaming for any purpose by any person, organization, or entity.[10] Class III gaming is lawful on Indian lands only if such activities are, along with other requirements, authorized by an approved tribal ordinance or resolution; located in a state that permits such gaming for any purpose by any person, organization, or entity; and conducted in conformance with a tribal-state compact entered into pursuant to statute.[11] Under the IGRA, a tribe cannot conduct class III gaming on its lands without a compact and cannot sue the State to enforce the State's duty to negotiate a compact in good faith.[12]

Observation:

Tribal gaming on non-Indian lands is not authorized by or regulated under the IGRA.[13] Thus, the question whether a tract is "Indian lands" determines, in part, the application and effect of the IGRA,[14] particularly the "restored lands" exception to the ban on gaming on lands taken into trust after the effective date of the IGRA.[15]

Practice Tip:

The IGRA abrogates tribal sovereign immunity for gaming on, but not off, Indian lands; a state lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation, in the absence of a waiver of immunity, but a state may bargain with the tribe for waiver of tribal sovereign immunity in exchange for state concessions regarding Class II or III gaming.[16]

CUMULATIVE SUPPLEMENT

Cases:

Land acquired by Seneca Nation of Indians in restricted fee pursuant to Seneca Nation Settlement Act (SNSA) after 1988 were not acquired "in trust," and thus did not fall within scope of Indian Gaming Regulatory Act's (IGRA) prohibition against class III gaming on lands acquired in trust after IGRA's enactment. Indian Gaming Regulatory Act, §§ 4(4), 20(a), 25 U.S.C.A. §§ 2703(4), 2719(a); 25 C.F.R. § 151.2(d, e). Citizens Against Casino Gambling in Erie County v. Chaudhuri, 802 F.3d 267 (2d Cir. 2015).

IGRA strikes a delicate balance between the sovereignty of states and federally recognized Native American tribes with respect to gaming on tribal land. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California, 973 F.3d 953 (9th Cir. 2020).

The phrase special programs and services provided by the United States to Indians because of their status as Indians, in Indian Gaming Regulatory Act's (IGRA) definition of Indian tribes refers to eligibility to participate in federal programs specifically targeted to Indians. Indian Gaming Regulatory Act § 4, 25 U.S.C.A. § 2703(5). Frank's Landing Indian Community v. National Indian Gaming Commission, 918 F.3d 610 (9th Cir. 2019).

State demonstrated that Department of Interior (DOI) regulations implementing the Indian Gaming Regulatory Act (IGRA) deprived it of the right to a judicial finding that it failed to negotiate in good faith, before a mediator or the Secretary were authorized to become involved in defining the terms under which Class III gaming can be conducted within its borders, thus constituting a procedural injury sufficient to satisfy the injury-in-fact requirement of Article III standing in action challenging the authority of the DOI to promulgate the regulations, where right to a judicial determination of bad faith was designed to protect a state's economic and other interests in the regulation of gaming, and the circumvention of the statutory process threatened to harm those interests by allowing the issuance of gaming procedures without the State's consent. U.S. Const. art. 3, § 2, cl. 1; Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(7)(B)(iii)-(vii); 25 C.F.R. § 291.8. New Mexico v. Department of Interior, 854 F.3d 1207 (10th Cir. 2017).

Congress did not intend to create an implied right of action that would have given states the right to sue Indian tribal officials to enjoin a certain class of gambling on tribal land under Indian Gaming Regulatory Act (IGRA), even though IGRA extended state laws regarding gambling into Indian country; IGRA did not contain language extending a state's power to enforce state law in Indian country, nor did it include other rights-creating language, it specifically addressed incorporation of state criminal punishments into federal law, but was silent regarding civil remedies, Congress's stated intent under IGRA was that federal government would be principal authority regulating Indian gaming, IGRA contained express remedies for tribal violations of it, not including a state's enforcement of state laws, and IGRA created a careful balance of federal, state, and tribal interests, which would have been upset by giving states power to enforce state laws in Indian country. 18 U.S.C.A. § 1166. Alabama v. PCI Gaming Authority, 801 F.3d 1278 (11th Cir. 2015).

Secretarial Procedures for authorizing gaming, under IGRA, which can only take place in the absence of an effective Tribal-State compact, were synonymous to gaming pursuant to a Tribal-State Compact, for purposes of IGRA's exception whereby Johnson Act's prohibition on possession or use of a gambling device within Indian Country did not apply when gaming was conducted under Tribal-State compact, and thus Secretary of the Interior did not violate Johnson Act in issuing Secretarial

Procedures regulating gaming activity by the North Fork Rancheria of Mono Indians on a parcel of land in Madera, California; a finding that IGRA provided exception to Johnson Act's general prohibition on use of slot machine in Indian country only when a valid Tribal-State compact had been entered into would result in internal inconsistencies within IGRA, would render issuance of Secretarial Procedures inoperative in every case, and would undermine statutory goals of IGRA and its remedial process, which was to provide leverage necessary for Indian tribes to encourage states to negotiate in good faith. 15 U.S.C.A. § 1171; Indian Gaming Regulatory Act § 11, 25 U.S.C.A. §§ 2710(d)(6), 2710(d)(7)(B)(vii). Stand Up for California! v. United States Department of the Interior, 328 F. Supp. 3d 1051 (E.D. Cal. 2018).

Indian tribe's jurisdiction over property taken into trust by the federal government on tribe's behalf under the Indian Reorganization Act (IRA) was sufficient to satisfy the requirement of the Indian Gaming Regulatory Act (IGRA) that a tribe seeking to conduct Class III gaming on Indian land be the tribe "having jurisdiction" over the land; federal government's acquisition of the property on tribe's behalf made the property "Indian country," as that term was statutorily defined, and IGRA simply required a link between the tribe and the property at issue, and did not impose an additional jurisdictional requirement. 18 U.S.C.A. § 1151; Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(1)(A)(i); 25 U.S.C.A. § 5108. Club One Casino, Inc. v. United States Department of the Interior, 328 F. Supp. 3d 1033 (E.D. Cal. 2018).

Casino operator satisfied inadequate representation requirement, as required to grant operator intervention as matter of right, in action under IGRA brought by state and Indian tribe against Department of the Interior (DOI), seeking to overturn Secretary of the Interior's failure to approve amendments to secretarial procedures authorizing tribe to conduct gaming that were worded such that tribes' joint venture, a non-tribal entity, could have built casinos on state land without causing state to forfeit royalty payments it received from tribal casinos, even though operator's and DOI's interests overlapped; Secretary's duty to serve public and its trust obligations to tribes were distinct from operator's commercial considerations, and fact that operator and DOI agreed on litigation posture did not mean that DOI would adequately represent operator's interests. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(7); Fed. R. Civ. P. 24(a). Connecticut v. United States Department of the Interior, 344 F. Supp. 3d 279 (D.D.C. 2018).

Casino operator had legally protected interest in action which may have been impaired if intervention were denied, as required to grant operator intervention as matter of right, in action under IGRA brought by state and Indian tribe against Department of the Interior, seeking to overturn Secretary of the Interior's failure to approve amendments to secretarial procedures authorizing tribe to conduct gaming, that were worded such that tribes' joint venture, a non-tribal entity, could have built casinos on state land without causing state to forfeit royalty payments it received from tribal casinos; reversal of Secretary's decision would have immediately diminished operator's chances of securing state approval for its casino proposal over tribes' competing proposal, and would have created imminent competition for operator's casino. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(7); Fed. R. Civ. P. 24(a). Connecticut v. United States Department of the Interior, 344 F. Supp. 3d 279 (D.D.C. 2018).

Determination by Assistant Secretary of Indian Affairs that proposed tribal-state compact amendment between tribe and State of Wisconsin, which contained exclusivity provision requiring loss mitigation payments if any other tribe developed a competing gaming facility within 30-50 miles, was not permitted under Indian Gaming Regulatory Act (IGRA) provision permitting tribal state compact on any subjects directly related to operation of gaming activities was reasonable, and thus was entitled to *Chevron* deference; compact effectively imposed mitigation payments on another tribe, which did not fall within plain language of provision, since an amendment aiming to protect one tribe's revenue at the expense of another did not address the regulation or operation of gaming, and conflicted with purpose of statute. Indian Gaming Regulatory Act § 2, 25 U.S.C.A. § 2701(d)(3)(C)(vii). Forest County Potawatomi Community v. United States, 330 F. Supp. 3d 269 (D.D.C. 2018).

When a state governor exercises authority, under IGRA, the governor is exercising state authority; therefore, the governor's concurrence with the Secretary of Department of Interior's (DOI) two-part determination that a proposed casino on an off-reservation site would be in best interest of an Indian tribe and would not be detrimental to the surrounding community is given effect under federal law, but the authority to act is provided by state law. Indian Gaming Regulatory Act § 20, 25 U.S.C.A.

§ 2719(b)(1)(A). Stand Up for California! v. U.S. Department of the Interior, 204 F. Supp. 3d 212, 95 Fed. R. Serv. 3d 1633 (D.D.C. 2016).

National Indian Gaming Commission did not act in arbitrary and capricious manner when, seventeen years after it approved agreement between Indian tribe and municipality for operation of Indian casino in municipality, it issued notice of violation directing tribe to cease performing under provisions of agreement that the Commission identified as violating the Indian Gaming Regulatory Act (IGRA); while notice of violation represented change in manner in which the Commission interpreted "sole and proprietary interest" requirement of the IGRA, the Commission was not estopped from changing a view that it believed to have been grounded upon mistaken legal interpretation, and mere fact that it had changed course did not render its action arbitrary and capricious. Indian Gaming Regulatory Act § 11(b)(2)(A), 25 U.S.C.A. § 2710(b)(2)(A). City of Duluth v. National Indian Gaming Commission, 89 F. Supp. 3d 56 (D.D.C. 2015).

State had duty under Indian Gaming Regulatory Act (IGRA) to negotiate in good faith on an extension of five-year limitation on banked card games in gaming compact with Indian tribe; understanding of tribe and State when they entered into compact was that they would revisit issue before five years ended, and statute that authorized Governor to negotiate compact in the first instance provided it was intent of legislature to review compact within five years after compact was approved. Indian Gaming Regulatory Act, § 11 (d)(3)(A), 25 U.S.C.A. § 2710(d)(3)(A); Fla. Stat. Ann. § 285.710(11). Seminole Tribe of Florida v. Florida, 219 F. Supp. 3d 1177 (N.D. Fla. 2016).

State would not suffer irreparable harm required to obtain preliminary injunctive relief if Interior Department were permitted to use secretarial procedures for seeking approval of its application to conduct Class III gaming activities on reservation without state's approval or judicial finding of bad faith, despite state's contentions that secretarial procedures diminished its bargaining position in its ongoing negotiations with tribe, that participation would cause dignitary harms, and it would have to invest time and resources to protect its interests, where state made no showing of concrete harm, and state retained its ability to challenge procedures' legality in court. Indian Gaming Regulatory Act, § 11(d)(7), 25 U.S.C.A. § 2710(d)(7); 25 C.F.R. § 291.1 et seq. New Mexico v. Department of the Interior, 126 F. Supp. 3d 1201 (D.N.M. 2014).

Indian Gaming Regulatory Act (IGRA) preempted State's excise tax on gross receipts of construction contractors, to extent that State sought to apply that tax to services performed by non-Indian contractor for construction project to renovate and expand tribe's on-reservation casino; Congress created a comprehensive and pervasive regulatory scheme with explicit intent of providing tribal governments with revenue and the ability to be self-sufficient, and excise tax undermined IGRA's objective because the legal incidence of the tax was passed on from the contractor to tribe, interfering with tribe's ability to make a profit from gaming activities. Indian Gaming Regulatory Act §§ 3, 11(b), 25 U.S.C.A. §§ 2702, 2710(b); S.D. Codified Laws § 10-46A-1. Flandreau Santee Sioux Tribe v. Sattgast, 325 F. Supp. 3d 995 (D.S.D. 2018).

Indian tribe, which owned and operated IGRA-sanctioned casino on tribal lands, adequately pleaded that state taxation of nonmember purchases of goods and services at casino was preempted by IGRA; taxes were result of casino activity, compact existed between tribe and state but did not direct state's authority to tax alcohol sales at tribe's casino, state could have negotiated for taxes on alcohol sales on casino floor depending on use to which those funds were to be put, questions remained regarding whether state waived its right to such tax imposition and whether sales of alcohol and other services was directly related to gaming, and tax interfered with IGRA's purpose of amplifying tribal development as it related to gaming. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(3)(C)(iii, vii), (d)(4); S.D. Codified Laws § 35-2-24. Flandreau Santee Sioux Tribe v. Gerlach, 155 F. Supp. 3d 972 (D.S.D. 2015).

Indian Gaming Regulatory Act (IGRA) did not protect defendant, who was an enrolled member of Indian tribe, from federal prosecution for conducting an illegal gambling business in Indian country, since the predicate state law offenses of willfully and knowingly conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business involving betting on cockfighting were valid predicate state offenses for purposes of the IGRA, and defendant's conduct was

not sanctioned by a Tribal–State compact. 18 U.S.C.A. §§ 1166(a), 1955; West's RCWA 9.46.220, 16.52.117. U.S. v. Olney, 129 F. Supp. 3d 1063 (E.D. Wash. 2015).

Since a tribal gaming compact involves trust responsibilities, statutory provision that grants the Executive branch general authority to negotiate and enter into cooperative agreements with Tribes within the State to address issues of mutual interest requires two separate approvals for a gaming compact to become effective: approval by the Joint Committee and approval by the Department of Interior. 74 Okla. Stat. Ann. § 1221(C). Treat v. Stitt, 2021 OK 3, 481 P.3d 240 (Okla. 2021).

[END OF SUPPLEMENT]

Footnotes

1 25 U.S.C.A. §§ 2701 et seq.

2 City of Roseville v. Norton, 348 F.3d 1020, 3 A.L.R. Fed. 2d 713 (D.C. Cir. 2003); Dalton v. Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 27 A.L.R. Fed. 2d 633 (2005).

3 Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); State ex rel. Dewberry v. Kitzhaber, 259 Or. App. 389, 313 P.3d 1135 (2013) review denied, 354 Or. 838, 325 P.3d 739 (2014).

4 25 U.S.C.A. § 2701(5).

As to the regulation of gambling, generally, see Am. Jur. 2d, Gambling §§ 1 et seq.

5 Muhammad v. Comanche Nation Casino, 742 F. Supp. 2d 1268 (W.D. Okla. 2010); Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668 (2002).

6 KG Urban Enterprises, LLC v. Patrick, 693 F.3d 1 (1st Cir. 2012).

7 State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 42 Fed. R. Serv. 3d 1127 (8th Cir. 1999); Dalton v. Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 27 A.L.R. Fed. 2d 633 (2005).

Federal law, not state law, governs gaming on Indian lands. State ex rel. Dewberry v. Kitzhaber, 259 Or. App. 389, 313 P.3d 1135 (2013) review denied, 354 Or. 838, 325 P.3d 739 (2014).

IGRA preemption of state law does not extend to all commercial activity remotely related to Indian gaming, such as employment contracts, food service contracts, and innkeeper codes. Wells Fargo Bank, Nat. Ass'n v. Apache Tribe of Oklahoma, 2015 OK CIV APP 10, 2014 WL 7772267 (Div. 2 2014), cert. denied, (Dec. 8, 2014).

8 Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

Federal regulations contain procedures for the Department of the Interior to use in determining whether exceptions apply for Class II and III gaming on lands acquired by the United States in trust for an Indian tribe. 25 C.F.R. §§ 292.1 et seq.

Federal regulations set requirements for obtaining a certificate of self-regulation of Class II gaming operations issued to a tribe. 25 C.F.R. §§ 518.1 et seq.

Federal regulations are provided for the National Indian Gaming Commission. 25 C.F.R. §§ 501.1 et seq.

9 25 U.S.C.A. § 2710(a)(1).

10 25 U.S.C.A. § 2710(a)(2).

11 25 U.S.C.A. § 2710(d).

As to federal regulations on Class III gaming, see 25 C.F.R. §§ 291.1 et seq., 293.1 et seq.

The state legislature may authorize the state governor to enter tribal-state compacts under the IGRA as the IGRA preempts the state's constitutional prohibition on commercial gambling. Dalton v. Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 27 A.L.R. Fed. 2d 633 (2005).

The legislature's approval of, and the governor's negotiation of, gaming compacts with Indian tribes is not a violation of the separation of powers. Taxpayers of Michigan Against Casinos v. State of Michigan, 478 Mich. 99, 732 N.W.2d 487 (2007).

12 Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

13 North County Community Alliance, Inc. v. Salazar, 573 F.3d 738 (9th Cir. 2009); Oklahoma v. Hobia, 775 F.3d 1204 (10th Cir. 2014).

The state's constitutional ban on casinos applies to non-Indian lands but not to Indian lands within the state's borders. State ex rel. Dewberry v. Kitzhaber, 259 Or. App. 389, 313 P.3d 1135 (2013) review denied, 354 Or. 838, 325 P.3d 739 (2014).

14 Rancheria v. Jewell, 776 F.3d 706 (9th Cir. 2015).

The tribe to which land is deeded for gaming under the IGRA must be a federally recognized tribe. Perme v. Southern Cherokee Nation of Oklahoma, 2011 OK 40, 253 P.3d 1290 (Okla. 2011).

A statute recognizing a tribe and granting the tribe jurisdiction over covered lands suffices for Class III gaming activities under the IGRA. Stop the Casino 101 Coalition v. Brown, 230 Cal. App. 4th 280, 178 Cal. Rptr. 3d 481 (1st Dist. 2014), cert. denied, 2015 WL 1692889 (U.S. 2015).

15 Rancheria v. Jewell, 776 F.3d 706 (9th Cir. 2015).

16 Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

As to tribal sovereign immunity, generally, see § 11.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 38

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

3. Review of Actions of Department of Interior Involving Indians

§ 38. Jurisdiction of action involving Indian matters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 240

A.L.R. Library

United States District Court jurisdiction of action brought by Indian tribe under 28 U.S.C.A. sec. 1362, 65 A.L.R. Fed. 649

Decisions of the Interior Board of Indian Appeals are final decisions of the Secretary of Interior, generally appealable to the district court.[1] The federal district courts have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.[2] The statute was also intended to open the federal courts to the kind of claims that could have been brought by the United States as trustee but for whatever reason were not so brought.[3] The statute does not waive any other jurisdictional bar that may exist.[4]

Jurisdiction also arises under the more general provision for federal question jurisdiction.[5]

Observation:

A claim based on an action or inaction by the Bureau of Indian Affairs in regard to a tribal election is not sufficient for district court jurisdiction if the matter necessarily requires an interpretation of the tribal constitution and is thus a matter for tribal authorities.[6]

Footnotes

1 Wilkinson v. U.S., 440 F.3d 970 (8th Cir. 2006).

2 28 U.S.C.A. § 1362.

The district court has jurisdiction, under 28 U.S.C.A. § 1362, of a challenge to the Interior Secretary's recognition of a rival tribal faction as a violation of the Administrative Procedure Act, due process, and the Indian Civil Rights Act. California Valley Miwok Tribe v. Salazar, 967 F. Supp. 2d 84 (D.D.C. 2013), appeal dismissed, 2014 WL 1378758 (D.C. Cir. 2014).

3 Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).

4 Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 79 Fed. R. Serv. 3d 55 (9th Cir. 2011).

5 28 U.S.C.A. § 1331.

The district court has federal question jurisdiction, under 28 U.S.C.A. § 1331, of a challenge to the Interior Secretary's recognition of a rival tribal faction as a violation of the Administrative Procedure Act, due process, and the Indian Civil Rights Act. California Valley Miwok Tribe v. Salazar, 967 F. Supp. 2d 84 (D.D.C. 2013), appeal dismissed, 2014 WL 1378758 (D.C. Cir. 2014).

Federal district courts have jurisdiction to grant declaratory and injunctive relief to Indians regarding actions of the Bureau of Indian Affairs under the arbitrary and capricious standard of the Administrative Procedure Act. Winnemucca Indian Colony v. U.S. ex rel. Dept. of the Interior, 837 F. Supp. 2d 1184 (D. Nev. 2011).

6 Sac & Fox Tribe of Mississippi in Iowa Election Board v. Bureau of Indian Affairs, 321 F. Supp. 2d 1055 (N.D. Iowa 2004).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 39

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

3. Review of Actions of Department of Interior Involving Indians

§ 39. Final agency action on Indian matters; exhaustion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 240, 243

In general, administrative remedies must be exhausted before a judicial suit is brought to review a Department of the Interior administrative action regarding Indian matters.[1] Final agency action is required within the meaning of the Federal Administrative Procedure Act[2] provided there is no unreasonable delay in the agency action.[3] Exhaustion is not required if the plaintiff can prove that it would not receive a fair and adequate administrative review of the issues, that the administrative remedies are inadequate,[4] not available,[5] or futile.[6]

CUMULATIVE SUPPLEMENT

Cases:

Exhaustion of administrative remedies would promote Bureau of Indian Affairs (BIA) autonomy, for purposes of determination whether members of Three Affiliated Tribes who possessed ownership interests in land under which oil and gas companies pipeline crossed were required to exhaust administrative remedies for judicial review of claims that companies were holding over following expiration of easement granted by BIA and that easement was void; BIA had delineated throughout its regulations certain discretionary actions it could take in both compliance investigations of rights-of-way and in holdover situations, and regulations provided that BIA decisions may have been appealed to BIA to give it opportunity to re-evaluate its decisions and make corrections if needed. 25 C.F.R. §§ 169.1, 169.404, 169.410. Hall v. Tesoro High Plains Pipeline Company, LLC, 478 F. Supp. 3d 834 (D.N.D. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Cloverdale Rancheria of Pomo Indians of California v. Jewell, 593 Fed. Appx. 606 (9th Cir. 2014); Kakaygeesick v. Salazar, 656 F. Supp. 2d 964 (D. Minn. 2009), judgment aff'd, 389 Fed. Appx. 580 (8th Cir. 2010); Gilmore v. Salazar, 748 F. Supp. 2d 1299 (N.D. Okla. 2010), aff'd, 694 F.3d 1160 (10th Cir. 2012).

2 Cloverdale Rancheria of Pomo Indians of California v. Jewell, 593 Fed. Appx. 606 (9th Cir. 2014); Gros Ventre Tribe v. U.S., 469 F.3d 801 (9th Cir. 2006).
Decisions of the Interior Board of Indian Appeals are final decisions of the Secretary of Interior, generally appealable to the district court. Wilkinson v. U.S., 440 F.3d 970 (8th Cir. 2006).

3 Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094 (D.C. Cir. 2003).

4 Gilmore v. Salazar, 748 F. Supp. 2d 1299 (N.D. Okla. 2010), aff'd, 694 F.3d 1160 (10th Cir. 2012).

5 Comanche Nation, Okl. v. U.S., 393 F. Supp. 2d 1196 (W.D. Okla. 2005).

6 Begay v. Public Service Co. of N.M., 710 F. Supp. 2d 1161 (D.N.M. 2010).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 40

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

A. Federal Government

3. Review of Actions of Department of Interior Involving Indians

§ 40. Standing for review of administrative action on Indian matters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 237, 240

When judicial review is sought of Department of the Interior administrative action regarding Indian matters, standing to sue must be established by the aggrieved parties,[1] including representative organizations[2] and Indian tribes.[3] A claim predicated on injuries to tribal interests can be brought under the Administrative Procedure Act only by a recognized tribe.[4]

Observations:

A state had standing to challenge the Secretary of Interior's decision to accept a transfer of land into trust for the benefit of an Indian tribe when, as an immediate consequence, a county would lose substantial property taxes depriving the state of tax revenues.[5] A state had standing to challenge the Interior Department's rules for gaming procedures based on a claim of actual injury suffered by the State's required participation in an administrative process allegedly exceeding the Secretary's regulatory authority under the Indian Gaming Regulatory Act.[6]

CUMULATIVE SUPPLEMENT

Cases:

Tribe exhausted all available administrative remedies for seeking review of National Park Service's decision to apply Native American Graves Protection and Repatriation Act (NAGPRA) to inventory remains and objects from a sacred site on reservation, as required for judicial review of decision; in 15 years prior to filing suit, tribe repeatedly demanded explanation of decision that NAGPRA applied, as well as return of remains and objects, and tribe's efforts yielded only correspondence reporting that Department of the Interior's solicitor opined that NAGPRA applied to remains and objects, and that no further opinion would be provided by the agency. Native American Graves Protection and Repatriation Act, § 5(a), 25 U.S.C.A. § 3003(a). Navajo Nation v. U.S. Dept. of Interior, 819 F.3d 1084 (9th Cir. 2016).

Indian tribe did not allege injury to quasi-sovereign interest that was sufficiently concrete to create actual controversy, and thus, tribe lacked standing in its parens patriae capacity to maintain claim against financial services company and national banking association for pulling credit reports of tribal members without their knowledge or consent in violation of the Fair Credit Reporting Act (FCRA); tribe only asserted injuries to tribal members and did not assert injuries to the tribe itself. Consumer Credit Protection Act § 604, 15 U.S.C.A. § 1681b. Navajo Nation v. Wells Fargo & Company, 344 F. Supp. 3d 1292 (D.N.M. 2018).

State's action challenging Department of Interior's authority under Indian Gaming Regulatory Act (IGRA) to implement regulations allowing Indian tribe to conduct Class III gaming on its reservation without compact with state was ripe for judicial review, even though Interior had not yet adopted any gaming procedures for tribe, and it remained possible for state and tribe to agree to binding compact, where question of whether Interior had authority to promulgate and enforce regulations in question was purely legal, Interior's promulgation of regulations was final, and uncertainty caused by eligibility determination caused state to make decisions during compact negotiations and considerable expenditures in face of uncertainty. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d); 25 C.F.R. § 291.3. State v. Department of Interior, 269 F. Supp. 3d 1145 (D.N.M. 2014).

[END OF SUPPLEMENT]

Footnotes

1 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012); Wilkinson v. U.S., 440 F.3d 970 (8th Cir. 2006).
The Interior Board of Indian Appeals' refusal to hear an appeal from a decision of the Bureau of Indian Affairs constituted a procedural injury, for purposes of standing to bring the appeal. Preservation of Los Olivos v. U.S. Dept. of Interior, 635 F. Supp. 2d 1076 (C.D. Cal. 2008).

2 Preservation of Los Olivos v. U.S. Dept. of Interior, 635 F. Supp. 2d 1076 (C.D. Cal. 2008); Bullcreek v. U.S. Dept. of Interior, 426 F. Supp. 2d 1221 (D. Utah 2006).
A group purporting to represent the tribe failed to demonstrate standing to petition for review of a tribal recognition decision, not establishing that it was the same group that petitioned for the recognition. Historic Eastern Pequots v. Salazar, 934 F. Supp. 2d 272 (D.D.C. 2013).
A nonrepresentative tribal faction lacks standing to challenge distributions to the tribe when the faction's rival is officially recognized by the federal government as the authorized tribal council. Timbisha Shoshone Tribe v. Salazar, 678 F.3d 935 (D.C. Cir. 2012).
Nonrepresentative individuals, not in the tribe's governing body, lack statutory standing. Cloverdale Rancheria of Pomo Indians of California v. Jewell, 593 Fed. Appx. 606 (9th Cir. 2014).

3 Winnemem Wintu Tribe v. U.S. Dept. of Interior, 725 F. Supp. 2d 1119 (E.D. Cal. 2010); Comanche Nation, Okl. v. U.S., 393 F. Supp. 2d 1196 (W.D. Okla. 2005).
Individuals do not have standing to bring a claim under a statute which only protects the rights of the Indian tribe. Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012).

4 Winnemem Wintu Tribe v. U.S. Dept. of Interior, 725 F. Supp. 2d 1119 (E.D. Cal. 2010).

5 South Dakota v. U.S. Dept. of Interior, 665 F.3d 986 (8th Cir. 2012).

6 Texas v. U.S., 497 F.3d 491 (5th Cir. 2007) (rejected on other grounds by, Alabama v. U.S., 630 F. Supp. 2d 1320 (S.D. Ala. 2008)).

End of Document

41 Am. Jur. 2d Indians; Native Americans IV B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 106, 211, 212, 330 to 343
West's Key Number Digest, Taxation 2063, 3480, 3482, 3612

A.L.R. Library

A.L.R. Index, Indians
A.L.R. Index, Preemption
A.L.R. Index, Taxation
West's A.L.R. Digest, Indians 106, 211, 212, 330 to 343
West's A.L.R. Digest, Taxation 2063, 3480, 3482, 3612

End of Document

41 Am. Jur. 2d Indians; Native Americans § 41

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

1. In General

§ 41. Limitation of state law applied to Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 211

The jurisdiction of the federal government over Indian tribes and over tribe members on Indian reservations is plenary and exclusive.[1] Indians on Indian reservations are generally not subject to state law, unless Congress expressly provides otherwise,[2] since the State's regulatory interest is then likely to be minimal, and the federal interest in encouraging tribal self-government is at its strongest on the reservation.[3]

In contrast, unless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law[4] provided it is not discriminatory.[5]

When state interests outside the reservation are implicated, as may be the case in the State's exercise of police powers,[6] states may regulate the activities even of tribe members on tribal land[7] but only in exceptional circumstances,[8] and state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided[9] or if the operation of federal law does not preempt the state.[10] However, federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal statute, and if state jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the State is generally divested of jurisdiction as a matter of federal law.[11]

The breadth of a state's regulatory power depends upon two criteria—the location of the targeted conduct and the citizenship of the participants in that activity.[12] The "who" and the "where" of the challenged state regulation of tribal activities have significant consequences that are often dispositive.[13] Substantial tribal interests in on-reservation activities may outweigh state

interests in the effect of those activities off-reservation,[14] but a tribe has no legitimate interest in selling on-reservation an opportunity to evade state law off-reservation.[15]

Observation:

In summary, there are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members: (1) preemption by federal law and (2) the right of reservation Indians to make their own laws and be ruled by them.[16] Either barrier alone can be a sufficient basis for finding a state law inapplicable.[17] A tribe has the power to prescribe the conduct of tribal members, and absent governing acts of Congress, a state may not act in a manner that infringes such power.[18]

Practice Tip:

In determining whether state law unlawfully infringes on the right of reservation Indians to make their own laws and be ruled by them, the courts must: (1) examine federal statutes and treaties in light of the broad policies that underlie them and notions of sovereignty that have developed from historical traditions of tribal independence; (2) weigh independent but related barriers of possible preemption under federal statutes and interference with the tribe's ability to exercise its sovereign functions; and (3) consider and give appropriate weight to the State's interest in exercising its regulatory authority over the activity in question.[19]

Observation:

Individual Indians who have severed their connection with the tribe to which they belonged, or who no longer maintain their tribal relations, are subject to the laws of the state where they happen to be unless specially excepted by the United States.[20]

CUMULATIVE SUPPLEMENT

Cases:

Exceptional circumstances did not warrant application of village's special events permit ordinance against Oneida Nation, its officers, and its employees, absent any argument that Nation's fee land was checkerboarded with non-tribal land such that uniform regulation was necessary to advance state interests, or why balance of tribal and state interests would merit departure

from general rule that state could not assert jurisdiction over Native Americans on reservations. Oneida Nation v. Village of Hobart, 968 F.3d 664 (7th Cir. 2020).

The two-part analysis under the *Williams v. Lee* infringement test for resolving conflicts between state and tribal jurisdiction applies to state assertions of regulatory jurisdiction and adjudicatory jurisdiction. C'Hair v. District Court of Ninth Judicial Dist., 2015 WY 116, 357 P.3d 723 (Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 § 32.

2 Swenson v. Nickaboine, 793 N.W.2d 738 (Minn. 2011); State v. Kostick, 755 S.E.2d 411 (N.C. Ct. App. 2014), review denied, 367 N.C. 508, 758 S.E.2d 872 (2014); State ex rel. Dewberry v. Kitzhaber, 259 Or. App. 389, 313 P.3d 1135 (2013) review denied, 354 Or. 838, 325 P.3d 739 (2014).
State authority does not generally extend to Indian tribes or members on Indian trust property. South Dakota v. U.S. Dept. of Interior, 665 F.3d 986 (8th Cir. 2012).

3 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services, 769 F.3d 105 (2d Cir. 2014).

4 Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Fond du Lac Band of Lake Superior Chippewa v. Frans, 649 F.3d 849 (8th Cir. 2011).

5 Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services, 769 F.3d 105 (2d Cir. 2014); Fond du Lac Band of Lake Superior Chippewa v. Frans, 649 F.3d 849 (8th Cir. 2011); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).

6 § 43.

7 Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

8 Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).

9 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); Texas v. U.S., 497 F.3d 491 (5th Cir. 2007) (rejected on other grounds by, Alabama v. U.S., 630 F. Supp. 2d 1320 (S.D. Ala. 2008)); In re Johnson, 800 N.W.2d 134 (Minn. 2011).

10 In re Johnson, 800 N.W.2d 134 (Minn. 2011).

11 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

12 Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services, 769 F.3d 105 (2d Cir. 2014).

13 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012); State, ex rel. Wasden v. Maybee, 148 Idaho 520, 224 P.3d 1109 (2010).

14 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

15 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980).

16 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012); State v. John, 233 Ariz. 57, 308 P.3d 1208 (Ct. App. Div. 2 2013); State v. Shale, 182 Wash. 2d 882, 345 P.3d 776 (2015).
As to federal preemption, see §§ 41, 42.

17 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).

18 Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

19 Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013).

20 U.S. v. Waller, 243 U.S. 452, 37 S. Ct. 430, 61 L. Ed. 843 (1917).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 42

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

1. In General

§ 42. Preemption

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 212

In addition to considerations of tribal sovereignty as an inherent limitation on state law,[1] state jurisdiction or regulatory authority over activities on Indian tribal lands is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the State's interests at stake are sufficient to justify the assertion of state authority.[2] When a detailed, federal regulatory scheme exists and its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law.[3]

A comprehensive preemption inquiry in the Indian law context involves an examination not only of the congressional plan but also of the nature of the state, federal, and tribal interests at stake—an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[4] The preemption inquiry is to proceed in light of the traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development, as expressed in federal statutes dealing with Indians.[5]

Preemption does not apply when a federal statute applies state law to an Indian tribe.[6]

Reminder:

Indian gaming is subject to an explicit federal regulatory scheme, preempting state law for certain classes of gaming on Indian land but preserving the application of state law to Indian gaming on non-Indian land and involving the state in certain classes of Indian gaming.[7]

CUMULATIVE SUPPLEMENT

Cases:

States have no authority to reduce federal reservations lying within their borders. U.S. Const. art. 1, § 8; U.S. Const. art. 6, cl. 2. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[END OF SUPPLEMENT]

Footnotes

1 § 41.

2 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008); Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005).
A state is without jurisdiction over nonmembers of an Indian tribe on a reservation if its authority is preempted. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

3 Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

4 Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).
A particularized inquiry into state, federal, and tribal interests is required. Estate of Ducheneaux v. Ducheneaux, 2015 SD 11, 861 N.W.2d 519 (S.D. 2015).
Before a state regulation is preempted, the regulatory interests of the State should be given consideration, and automatic exemptions as a matter of constitutional law are unusual. State, ex rel. Wasden v. Maybee, 148 Idaho 520, 224 P.3d 1109 (2010).

5 California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); State v. John, 233 Ariz. 57, 308 P.3d 1208 (Ct. App. Div. 2 2013).

6 Aroostook Band of Micmacs v. Ryan, 484 F.3d 41 (1st Cir. 2007).

7 § 37.

41 Am. Jur. 2d Indians; Native Americans § 43

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

1. In General

§ 43. Police powers of State applied to Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 211

Under a state's police powers, only safety and conservation can justify forbidding normal Indian activity authorized to tribes on Indian land.[1] The State may exercise police power to conserve important natural resources on Indian lands.[2]

In order for a state to justify a public-safety need to restrict Indian rights recognized by the federal government, it must show that: (1) a substantial detriment or hazard to public health or safety exists or is imminent; (2) a particular regulation sought to be imposed is necessary to the prevention or amelioration of public health or a safety hazard; (3) the application of a particular regulation to the tribes is necessary to effectuate a particular public health or safety interest; and (4) its regulation is the least restrictive alternative available to accomplish its health and safety purposes.[3]

Observation:

The Federal Highway Beautification Act does not expressly authorize a state to regulate advertising billboards on land held by the federal government in trust for Indian tribes, and the Act's enforcement is reserved for the federal government; the State is not entitled to exercise its police power to regulate tribal lands for this purpose in the absence of sufficient state interests to justify its assertion of authority over federal and tribal interests.[4]

Footnotes

1 Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Wisconsin, 769 F.3d 543, 89 Fed. R. Serv. 3d 1730 (7th Cir. 2014), cert. denied, 135 S. Ct. 1842 (2015).

2 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

3 Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Wisconsin, 769 F.3d 543, 89 Fed. R. Serv. 3d 1730 (7th Cir. 2014), cert. denied, 135 S. Ct. 1842 (2015).

4 Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 44

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

2. State Taxing of Indian Income, Sales, or Property

§ 44. General state tax exemption of Indian tribes and Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 211
West's Key Number Digest, Taxation 2063, 3480, 3482, 3612

The United States Constitution vests the federal government with exclusive authority over relations with Indian tribes,[1] and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States,[2] Indians and Indian tribes generally are exempt from state taxation within their own territory.[3] In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians,[4] but the general exemption of reservation Indians from state taxation is lifted only when Congress has made its intention to do so unmistakably clear.[5]

If state taxation of Indians is at issue, tribal interests are strongest when the state tax is based on the value derived from on-reservation conduct involving only tribal members and when the taxpayer is a recipient of tribal services.[6] A state tax on Indians is generally valid when the tax is directed at value generated off-reservation, and the taxpayer is a recipient of the state's services.[7]

In the context of Indian claims of tax exemptions, there is no requirement to find express statutory exemption language before employing the canon of construction favoring Indians[8] although the courts may weigh in favor of caution against interpreting statutes as providing tax exemptions for Indians when the exemptions are not clearly expressed and unambiguously proved.[9]

Footnotes

1 § 32.

2 §§ 9, 10.

3 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985); Coeur D'Alene Tribe of Idaho v. Hammond, 384 F.3d 674 (9th Cir. 2004).

4 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

5 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985); Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002).

6 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980); Maryboy v. Utah State Tax Com'n, 904 P.2d 662 (Utah 1995).

7 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980); Maryboy v. Utah State Tax Com'n, 904 P.2d 662 (Utah 1995).

8 King Mountain Tobacco Co., Inc. v. McKenna, 768 F.3d 989 (9th Cir. 2014), cert. denied, 135 S. Ct. 1542 (2015).

9 Chickasaw Nation v. U.S., 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 45

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

2. State Taxing of Indian Income, Sales, or Property

§ 45. State income taxes applied to Indian tribes and Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 211
West's Key Number Digest, Taxation 3480, 3482

As a general proposition, states may not tax the income of Indians from activities carried on within the boundaries of the Indian reservation, absent congressional consent or tribal agreement.[1] The State may not assess tax on a tribal member's income when the member both lives within "Indian Country," even if not on a formal reservation, and earns the income within "Indian Country,"[2] but state income tax may apply to an Indian's income when the Indian is not a resident of "Indian Country" and the income is not derived from Indian sources.[3] State tax may also apply to Indian tribal members who reside in the state but outside "Indian Country" even though they work for the tribe.[4]

The imposition of state income taxes on a state employee who was a member of an Indian tribe and resided on the reservation was preempted by a federal treaty which set apart the reservation for the use and occupation of the tribe, in view of evidence that the Indian was employed as a therapist for Indians living on the reservation and that the employment activity depended entirely on the Indians' needs for mental health services.[5] In contrast, the State's interest in imposing income taxes on a county commissioner who was a member of an Indian tribe and lived on the reservation was sufficient to overcome the presumption against state authority to impose income taxes on Indians when the county commissioner represented the citizens of an entire county and when allowing taxation did not create a substantial burden on the ability of tribal members to make their own laws and be governed by them.[6]

The wages received by a Native American who did not abandon his reservation domicile while serving in the United States Navy were not subject to state income tax; the Federal Soldiers' and Sailors' Civil Relief Act preserved the Native American serviceman's immunity from taxation and preserved the serviceman's domicile.[7]

Footnotes

1 Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); Maryboy v. Utah State Tax Com'n, 904 P.2d 662 (Utah 1995).
The Menominee Termination Act yielded the Indians' barrier to state income taxation. Webster v. Wisconsin Dept. of Revenue, 102 Wis. 2d 332, 306 N.W.2d 701 (Ct. App. 1981).

2 Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

3 In re O'Bregon, 2001 OK CIV APP 24, 20 P.3d 175 (Div. 1 2001).

4 Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

5 Maryboy v. Utah State Tax Com'n, 904 P.2d 662 (Utah 1995).

6 Maryboy v. Utah State Tax Com'n, 904 P.2d 662 (Utah 1995).

7 Fatt v. Utah State Tax Com'n, 884 P.2d 1233 (Utah 1994).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 46

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

2. State Taxing of Indian Income, Sales, or Property

§ 46. Excise and sales taxes applied to Indian tribes and Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 211
West's Key Number Digest, Taxation 3612

Forms

Am. Jur. Pleading and Practice Forms, Indians, American § 37 (Complaint, petition, or declaration—By motor fuel dealer—To recover motor fuel taxes wrongfully assessed by state agency against sales on Indian reservation)

The states are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization.[1] Even when a state imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation, and the imposition of the tax fails to satisfy the preemption interest-balancing test.[2] The balancing test requirement does not apply when the State asserts its taxing authority over non-Indians off the reservation.[3]

A county's excise tax on sales of fee patented lands held by an Indian tribe or tribe members is invalid since the Indian General Allotment Act authorizes only taxation of land but not taxation with respect to land or the taxation of transactions involving land.[4]

A state that has not asserted jurisdiction over Indian lands may collect taxes on sales of goods occurring on land held in trust for a federally recognized Indian tribe, when such sales are made to nontribal members, although the State may not tax such sales when they are made to Indians.[5] When state taxes are imposed on the sale of non-Indian products to non-Indians on an Indian reservation, the balance tips toward state interests in determining whether the State's power to tax has been preempted.[6] The Indian Reorganization Act bars a state's imposition of rental tax on rent paid to an Indian tribe by non-Indian lessees for the use of commercial space at the tribe's casinos on reservation land since the Act's regulatory scheme is preemptively pervasive.[7]

A state may require an Indian tribe to collect cigarette taxes from non-Indian purchasers of cigarettes at shops in the reservation and remit the tax collected to the state.[8] A state may impose minimal burdens on Indians to collect cigarette taxes from non-Indians for transactions occurring in Indian country.[9] A state has the power to apply its general sales and cigarette excise taxes to Indians residing on a reservation in the state who are not enrolled in the reservation's governing tribe; the State's interest in taxing such persons outweighs any tribal interest that may exist in preventing the State from imposing its taxes.[10] A state may require cigarette wholesalers selling cigarettes for ultimate resale on Indian reservations to limit their sale of untaxed cigarettes to persons who can produce valid tax exemption certificates, and related requirements, since the state regulations further the legitimate state goal of insuring that tax exempt cigarettes are sold only to Indians.[11]

A state may not impose its motor vehicle and mobile home, camper, and travel trailer excise taxes for the privilege of using the covered vehicles in the state when the vehicles are used by Indian tribes or their members, both on and off their reservations located in the state.[12]

A state may not apply a motor fuels tax to fuels sold by a tribe in Indian Country, levying the tax directly on the tribe or its members, in the absence of clear congressional authorization; the dispositive test is who bears the legal incidence of the tax in terms of whether it rests on the tribe as the retailer, on a wholesaler who sells to the tribe, or to the consumer who buys from the tribe.[13]

CUMULATIVE SUPPLEMENT

Cases:

Treaty Between the United States and the Yakama Nation of Indians did not protect the Yakamas from state sales taxes imposed on the off-reservation sale of goods. (Per Justice Breyer, with two justices concurring and two justices concurring in the judgment.) Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

A party challenging a state cigarette tax under the Indian Commerce Clause must establish that a state's tax collection mechanism is unduly burdensome and not reasonably tailored to collection of the taxes. U.S. Const. art. 1, § 8, cl. 3. New York v. Mountain Tobacco Company, 942 F.3d 536 (2d Cir. 2019).

Tribal interests did not weigh in favor of finding that Washington State and county's collection of taxes, including retail sales and use tax, business and occupation tax, and personal property tax, from non-Indian owned businesses in municipality located on Indian reservation was preempted by operation of federal law; although Indian tribe had substantial sovereign interests in the development and operation of the municipality, the taxes at issue were not on tribe's efforts in developing the municipality, imposition of State taxing authority was on value of non-tribal goods imported from off the reservation being sold to non-Indian customers, and only tribal interest the State and county taxes interfered with was tribe's ability to collect full measure of its own sales tax. Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008).
Transactions between Indian retailers located on a reservation and Indian consumers were nontaxable absent congressional authorization since the legal incidence of the sales tax fell on the Indian retailer. Keweenaw Bay Indian Community v. Rising, 569 F.3d 589 (6th Cir. 2009).

2 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005).

3 Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005).

4 County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).
As to state and local property taxes on Indian land, see § 47.
As to allotment of Indian lands, generally, see §§ 67 to 69.

5 Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

6 Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008).

7 Seminole Tribe of Florida v. Florida, 49 F. Supp. 3d 1095 (S.D. Fla. 2014).

8 Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 106 S. Ct. 289, 88 L. Ed. 2d 9 (1985); Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d Cir. 2011).
The legal incidence of the state's excise tax on cigarettes did not fall on the Indian retailers on Indian lands but on the non-Indian purchasers. Keweenaw Bay Indian Community v. Rising, 477 F.3d 881, 2007 FED App. 0084P (6th Cir. 2007); Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078 (9th Cir. 2011).
A joint memorandum of understanding and Settlement Act permitted the State to enforce the taxation of cigarette sales on Native American settlement lands. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006).

9 Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d Cir. 2011); Keweenaw Bay Indian Community v. Rising, 477 F.3d 881, 2007 FED App. 0084P (6th Cir. 2007); Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).

10 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980).

11 Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 114 S. Ct. 2028, 129 L. Ed. 2d 52 (1994).
A state requirement that cigarette retailers on Indian reservations obtain state tax exemption certificates, in connection with sale of cigarettes to Indians, was not preempted by federal statute. Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).

12 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980).
State motor vehicle taxes may not be imposed on tribal members who live in "Indian Country" even if not on a formal reservation. Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

13 Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

41 Am. Jur. 2d Indians; Native Americans § 47

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

IV. Power of Federal and State Governments in Matters Involving Indians

B. State Government

2. State Taxing of Indian Income, Sales, or Property

§ 47. State and local property taxes applied to Indian tribes and Indians

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 106, 211
West's Key Number Digest, Taxation 2063

Forms

Federal Procedural Forms § 41:72 (Complaint in district court—For declaratory and injunctive relief—To enjoin county from collecting taxes on mobile homes owned by Indians and located on reservation land [28 U.S.C.A. §§ 1337, 1343(a)(4), 1360(b), 2201; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 8(a), 57, 65])

A state is without power to tax Indian reservation lands absent some federal statute permitting it.[1] The general exemption of Indian lands from state taxation is lifted only when Congress makes its intention to do so unmistakably clear.[2]

When the Interior Secretary takes land into trust for the use of an Indian tribe pursuant to the Indian Reorganization Act,[3] the land is held under the superintendence of the federal government and is ordinarily exempt from state or local taxation.[4]

Under the General Allotment Act,[5] provisions rendering allotted Indian land alienable and encumberable also renders the land subject to assessment and forced sale for taxes.[6] Under the Act, when Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render the land subject to state and local taxation, and the repurchase of the land by an Indian tribe does not cause the land to reassume a tax-exempt status.[7]

A state constitutional provision that the State may tax lands held by any Indian, whether by patent or other grant, when the Indian has severed tribal relations, does not preclude a county from taxing, pursuant to state tax law, lands held by Indians who have not terminated their affiliations with their tribe because the constitutional provision does not exempt from taxation lands not covered by the provisions but merely commits such lands to congressional jurisdiction and control; thus, if Congress has permitted taxation, the provisions are not violated.[8]

Observation:

A treaty ambiguity as to whether Indian land is freely alienable and therefore subject to state taxation must be resolved in favor of the tribe, precluding state taxation.[9]

Caution:

Equitable considerations of laches, acquiescence, and impossibility barred the claims of an Indian tribe that its open-market purchases of specific parcels once within the boundaries of the tribe's former reservation unified the fee and aboriginal title and therefore precluded municipal taxation of the land.[10]

CUMULATIVE SUPPLEMENT

Cases:

Oklahoma's separation of powers doctrine is evident in the State's negotiation of tribal gaming compacts with Indian Tribes; the Governor has the statutory authority to negotiate such compacts with Indian tribes to assure the State receives its share of revenue, but the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the State-Tribal Gaming Act. Okla. Const. art. 5, § 1; Okla. Const. art. 6, §§ 8, 11; 74 Okla. Stat. Ann. § 1221. Treat v. Stitt, 2020 OK 64, 473 P.3d 43 (Okla. 2020), as corrected, (July 22, 2020).

Provision of Indian Reorganization Act of 1934 (IRA) exempting land acquired pursuant to its provisions from state and local taxation did not expressly preempt county from assessing ad valorem taxes on taxpayers who were a lake association that leased trust land from Bureau of Indian Affairs (BIA) and sub-lessees who were non-Indian owners of permanent improvements around lake, where there was no indication that land on which taxpayers' structures sat was ever subject of a fee-to-trust transfer under IRA. 25 U.S.C.A. § 5108; S.D. Codified Laws § 10-4-2.1. Pickerel Lake Outlet Association v. Day County, 2020 SD 72, 953 N.W.2d 82 (S.D. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998); Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002); Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis., 891 F. Supp. 2d 1058 (E.D. Wis. 2012), aff'd, 732 F.3d 837 (7th Cir. 2013), cert. denied, 134 S. Ct. 2661, 189 L. Ed. 2d 209 (2014).

2 Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998); Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002).

3 § 5.

4 Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998); Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002).

5 25 U.S.C.A. §§ 334 et seq.
As to allotment of Indian lands, generally, see §§ 67 to 69.

6 County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).
Freely alienable land of a tribal member is not "Indian Country" and is subject to county ad valorem taxation. Thompson v. County of Franklin, 314 F.3d 79 (2d Cir. 2002).

7 Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998).

8 County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).

9 Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514, 2006 FED App. 0207P (6th Cir. 2006).

10 City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005).

End of Document

41 Am. Jur. 2d Indians; Native Americans V Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

V. Treaties with Indians

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 121 to 125

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 121 to 125

End of Document

41 Am. Jur. 2d Indians; Native Americans § 48

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

V. Treaties with Indians

§ 48. Overview of Indian treaties; historical matters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 121 to 123

Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them.[1] In that year, however, Congress, by statute, declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, instead of by treaty.[2] Consequently, since that time, Indian affairs have been regulated by acts of Congress and by contracts with the Indian tribes practically amounting to treaties.[3]

The United States, as guardian of Indians, deals only with Indian nations, tribes, or bands and does not enter into contracts, compacts, or treaties with individual Indians.[4] However, rights reserved by an Indian tribe under a treaty with the United States can be asserted by an individual member of that tribe.[5]

In treaties involving Indians, the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.[6]

Footnotes

1 Blackfeather v. U.S., 190 U.S. 368, 23 S. Ct. 772, 47 L. Ed. 1099 (1903).

2 Cherokee Nation v. Hitchcock, 187 U.S. 294, 23 S. Ct. 115, 47 L. Ed. 183 (1902); Stephens v. Cherokee Nation, 174 U.S. 445, 19 S. Ct. 722, 43 L. Ed. 1041 (1899).

3 Lane v. Morrison, 246 U.S. 214, 38 S. Ct. 252, 62 L. Ed. 674 (1918); Eastern Cherokees v. U.S., 225 U.S. 572, 32 S. Ct. 707, 56 L. Ed. 1212 (1912).

4 Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma, 220 U.S. 481, 31 S. Ct. 473, 55 L. Ed. 552 (1911); Blackfeather v. U.S., 190 U.S. 368, 23 S. Ct. 772, 47 L. Ed. 1099 (1903).

Only the tribe that signed the treaty, or the signatory tribe, can exercise treaty rights; individual Indians do not have any treaty rights even if they are descendants of the signors of the treaty. State v. Posenjak, 127 Wash. App. 41, 111 P.3d 1206 (Div. 3 2005).

5 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

6 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979), opinion modified on other grounds, 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 49

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

V. Treaties with Indians

§ 49. Construction of Indian treaties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 124

The language used in treaties with Indian tribes must not be construed to their prejudice; rather, if any words are susceptible of a more extended meaning than their plain import, they must be construed in favor of the tribe.[1] A liberal construction is required, resolving uncertainties in favor of the Indians.[2] The treaty must be construed not according to the technical meaning of its words but in the sense in which such words would be understood by the Indians.[3] It is the responsibility of the Supreme Court of the United States to see that the terms of a treaty between an Indian tribe and the United States are carried out, insofar as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council at which the treaty was negotiated and in a spirit that generously recognizes the full obligation of the United States to protect the interests of a dependent people.[4] The court looks beyond the written words to the larger context that frames the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.[5]

Treaties that do not contain language demonstrating a plain and unambiguous intent to extinguish Indian title are not sufficient to show that the United States has ratified Indian tribes' conveyance of tribal land to a state without the approval of the United States.[6] However, the courts cannot disregard the obvious, palpable meaning of a treaty merely because that meaning may work an injustice to the Indians.[7] A court cannot look beyond clear treaty language and rewrite a treaty with respect to a point on which a party may have been misled even as to treaties that are the products of bribery, fraud, or duress.[8]

To determine whether a treaty abrogated rights previously guaranteed to Indians, the Supreme Court would look beyond the written words to the larger context that framed the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.[9] Rights not explicitly abrogated in a treaty are presumed to have been reserved by the Indian tribe.[10] A treaty with an Indian tribe constitutes a grant of rights from them, not a grant of rights from the United States to the Indians.[11]

A long-established statutory construction and practice of the Department of the Interior in dealing with the Indians is entitled to considerable weight when the case is one for alleged proportionate shares of appropriations to fulfill treaty obligations.[12]

Federal statutes are construed as abrogating Indian treaty rights only when there is clear evidence that Congress actually considered the conflict between its intended action on the one hand, and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.[13]

CUMULATIVE SUPPLEMENT

Cases:

If an Indian treaty itself defines the circumstances under which the rights would terminate, it is to those circumstances that the Court must look to determine if the right ends at statehood. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

Plain language of IGRA precluded Indian tribe from claiming state acted in bad faith in entering into amendment to tribal-state gaming compact for casino style gaming devices based on state's misrepresentation that no further gaming licenses were available under IGRA, where tribe actually agreed to amendment, and tribe did not challenge negotiation process under IGRA. Indian Gaming Regulatory Act, § 11(d)(7)(B)(ii)(I), 25 U.S.C.A. § 2710(d)(7)(B)(ii)(I). Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California, 804 F.3d 1031 (9th Cir. 2015).

Courts should interpret treaties with Indian tribes to give effect to the intent of the signatories. Rosebud Sioux Tribe v. Trump, 428 F. Supp. 3d 282 (D. Mont. 2019).

Examination of an Indian treaty's negotiating history and purpose does not render its interpretation a matter of fact but merely serves as an aid to the legal determination which is at the heart of all treaty interpretation. In re CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322 (Idaho 2019).

[END OF SUPPLEMENT]

Footnotes

1 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

2 U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); Richard v. U.S., 677 F.3d 1141 (Fed. Cir. 2012); State v. Jim, 173 Wash. 2d 672, 273 P.3d 434 (2012).
Doubtful expressions should be resolved in the Indians' favor. U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010).

3 Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970); Peoria Tribe of Indians of Okl. v. U.S., 390 U.S. 468, 88 S. Ct. 1137, 20 L. Ed. 2d 39 (1968); U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010); Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008).

4 Tulee v. State of Washington, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

5 U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010); Richard v. U.S., 677 F.3d 1141 (Fed. Cir. 2012).

6 Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985).

7 Northwestern Bands of Shoshone Indians v. U.S., 324 U.S. 335, 65 S. Ct. 690, 89 L. Ed. 985 (1945); Choctaw Nation of Indians v. U.S., 318 U.S. 423, 63 S. Ct. 672, 87 L. Ed. 877 (1943).

8 Menominee Indian Tribe of Wisconsin v. Thompson, 943 F. Supp. 999 (W.D. Wis. 1996), decision aff'd, 161 F.3d 449 (7th Cir. 1998).

9 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). An abrogation of Indian rights by treaty requires a clear intent and express agreement. Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008).

10 U.S. v. Wilbur, 674 F.3d 1160 (9th Cir. 2012).

11 Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008).

12 Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma, 220 U.S. 481, 31 S. Ct. 473, 55 L. Ed. 552 (1911).

13 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 50

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

V. Treaties with Indians

§ 50. Force and effect of Indian treaties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 121 to 125

A United States treaty with an Indian tribe is, under Article VI of the United States Constitution, the supreme law of the land,[1] superseding all customs contrary thereto, and it cannot be annulled either in effect or operation by courts.[2] The federal government is bound to carry out the obligations of such treaties in the same manner as an individual would be bound.[3] The government, in carrying out its obligations under its treaties with Indian tribes, occupies a trust relationship; thus, its conduct is judged by the most-exacting fiduciary standards.[4] Prolonged nonenforcement, without preemption, does not extinguish Indian rights under a treaty.[5]

A legislative ratification by Congress of an agreement between the federal executive branch and an Indian tribe is a law of the United States made pursuant to the Constitution.[6] However, a treaty signed between the United States and certain Indian tribes, but never ratified by the United States Senate, has no binding effect on the United States.[7]

A treaty between the United States and an Indian tribe is essentially a contract between two sovereign nations.[8]

Footnotes

1 Menominee Tribe of Indians v. U.S., 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968); Skokomish Indian Tribe v. U.S., 410 F.3d 506 (9th Cir. 2005); People v. Patterson, 5 N.Y.3d 91, 800 N.Y.S.2d 80, 833 N.E.2d 223 (2005).

2 Johnson v. Riddle, 240 U.S. 467, 36 S. Ct. 393, 60 L. Ed. 752 (1916).

3 Crews v. Burcham, 66 U.S. 352, 17 L. Ed. 91, 1861 WL 7647 (1861).

4 Seminole Nation v. U.S., 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942).

5 Richard v. U.S., 677 F.3d 1141 (Fed. Cir. 2012).

6 Antoine v. Washington, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975).

7 Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1986) (rejected on other grounds by, Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395 (D.S.D. 1995)); Karuk Tribe of California v. U.S., 41 Fed. Cl. 468 (1998), aff'd, 209 F.3d 1366 (Fed. Cir. 2000).

8 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979), opinion modified on other grounds, 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979); Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012); Pocatello v. State, 145 Idaho 497, 180 P.3d 1048 (2008).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 51

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

V. Treaties with Indians

§ 51. Force and effect of Indian treaties—Modification or abrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 121 to 125

Congress may supersede or abrogate Indian treaties by legislation[1] since treaties are the legal equivalent of federal statutes,[2] but Congress must make its intention to do so clear and plain.[3] There must be clear evidence that Congress actually considered a conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty.[4] If a statute of general applicability is silent on the issue of applicability to Indian tribes, it will not apply if its application would abrogate rights guaranteed by Indian treaties.[5]

Observation:

The fact that an Indian tribe is not administratively recognized by the Secretary of the Interior as an Indian tribe does not affect the tribe's vested treaty rights.[6] Tribal rights under a tribal treaty do, however, depend on the tribe's status as one descended from the treaty signatory tribe as one preserving some defining characteristic of the original tribe.[7]

CUMULATIVE SUPPLEMENT

Cases:

The Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties; but that power belongs to Congress alone. U.S. Const. art. 1, § 8. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

The crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied; statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress's clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009).
The Department of the Interior cannot do so, directly or indirectly. Timpanogos Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002).

2 Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009).

3 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015).

4 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015).

5 U.S. v. Fiander, 547 F.3d 1036 (9th Cir. 2008).

6 Timpanogos Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002).

7 Posenjak v. Department of Fish & Wildlife of State of Washington, 74 Fed. Appx. 744 (9th Cir. 2003).
The failure to move onto the reservation is not determinative of tribal status or identity for the purpose of retained treaty rights. U.S. v. State of Or., 43 F.3d 1284 (9th Cir. 1994).

41 Am. Jur. 2d Indians; Native Americans VI A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 150 to 160, 170, 342

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 150 to 160, 170, 342

End of Document

41 Am. Jur. 2d Indians; Native Americans § 52

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 52. Indian lands rights and title as possessory

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 150 to 160

A.L.R. Library

Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425

The fee to the lands in this country in the original occupation of the Indian tribes has, from the time of the formation of the United States government, been vested in the United States[1] as originally predicated on the "doctrine of discovery."[2] The Indian title as against the United States is a right to perpetual occupancy and use of the land, until surrendered to the government,[3] or a permissive right to occupy land, fee title to the land resting with the United States government.[4]

An Indian tribe's aboriginal interest in land is the tribe's right to occupy the land; it is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties.[5] Aboriginal title does not depend on a treaty or an act of Congress,[6] or fee title,[7] but is defined as title based upon actual, exclusive, and continuous occupancy for a long time,[8] as an equitable possessory interest, not superior to that possessed by the actual titleholder, the United States.[9]

Practice Tip:

The continuous use and occupancy requirement for an Indian group to demonstrate the existence of an aboriginal right is measured in accordance with the way of life, habits, customs, and usages of the Indians who are its users and occupiers and includes an element of exclusivity or the exercise of full dominion and control over the area and possession of the right and power to expel intruders.[10]

Observation:

As a rule, Indian lands are not included in the term "public lands."[11]

CUMULATIVE SUPPLEMENT

Cases:

All conquering sovereigns possess complete dominion, but to exercise something is not to merely possess it, but to put it into action; thus, to exercise complete dominion, as would extinguish aboriginal title, the sovereign must put its dominion into action, through some sort of affirmative act. United States v. Abouselman, 976 F.3d 1146 (10th Cir. 2020).

United States' grant of land to private landowners did not preclude Pueblo of Jemez Native American Tribe from claiming it possessed aboriginal title to Valles Caldera National Preserve; 1860 Act permitting landowners to acquire Valles Caldera contained no language that purported to extinguish aboriginal title, and Surveyor General at time lacked authority to extinguish aboriginal title. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943 (D.N.M. 2019).

[END OF SUPPLEMENT]

Footnotes

1 City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005).

2 City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005); Delaware Nation v. Pennsylvania, 446 F.3d 410 (3d Cir. 2006), as amended (June 14, 2006).

3 Tee-Hit-Ton Indians v. U.S., 15 Alaska 418, 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314 (1955).

4 Oneida Indian Nation of N. Y. State v. Oneida County, New York, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); Bingham v. Massachusetts, 616 F.3d 1 (1st Cir. 2010); Lyon v. Gila River Indian Community, 626 F.3d 1059, 77 Fed. R. Serv. 3d 1369 (9th Cir. 2010).

5 White v. University of California, 765 F.3d 1010, 308 Ed. Law Rep. 701, 89 Fed. R. Serv. 3d 932 (9th Cir. 2014).

6 Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

7 Bingham v. Massachusetts, 616 F.3d 1 (1st Cir. 2010); Lyon v. Gila River Indian Community, 626 F.3d 1059, 77 Fed. R. Serv. 3d 1369 (9th Cir. 2010).

8 Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

9 Alabama-Coushatta Tribe of Texas v. U.S., 757 F.3d 484 (5th Cir. 2014).

Aboriginal title is mere possession, granted by the federal government to the aboriginal possessors. Lyon v. Gila River Indian Community, 626 F.3d 1059, 77 Fed. R. Serv. 3d 1369 (9th Cir. 2010).

10 Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

As to use or occupancy by two or more tribes, see § 54.

11 Missouri, K. & T.R. Co., v. U.S., 235 U.S. 37, 35 S. Ct. 6, 59 L. Ed. 116 (1914).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 53

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 53. Indian lands rights and title as tribal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 150, 151, 160

A.L.R. Library

Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425

The right and title of Indians to possess and occupy Indian lands[1] is in the tribe[2] and not in the individual Indian, and the right of individual Indians to share in the tribal property usually depends upon tribal membership.[3] The fact that certain Indians have been allowed by the tribe to have sole use of a particular area gives those individuals no property right against the tribe.[4] A grant of Indian-occupied land by the government to an individual does not constitute an extinguishment of the Indians' aboriginal title.[5]

CUMULATIVE SUPPLEMENT

Cases:

At time United States adopted Constitution, tribal rights to Indian lands became exclusive province of federal law. Wolfchild v. Redwood County, 824 F.3d 761 (8th Cir. 2016).

Under the regulations governing the Bureau of Indian Affairs' (BIA) management of leases on allotted land, the government is required to obtain majority consent of Indian landowners to approve a new lease; however, the regulations do not require the government to obtain majority consent to eject trespassers. 25 C.F.R. §§ 162.012, 162.023. Grondal v. Mill Bay Members Association, Inc., 471 F. Supp. 3d 1095 (E.D. Wash. 2020), order clarified, 2020 WL 4590527 (E.D. Wash. 2020).

[END OF SUPPLEMENT]

Footnotes

1 § 52.

2 U.S. v. Genschow, 645 F.3d 803 (6th Cir. 2011); White v. University of California, 765 F.3d 1010, 308 Ed. Law Rep. 701, 89 Fed. R. Serv. 3d 932 (9th Cir. 2014).

3 Halbert v. U.S., 283 U.S. 753, 51 S. Ct. 615, 75 L. Ed. 1389 (1931).
As to individual allotments of Indian land, see §§ 67 to 69.

4 Whitefoot v. U. S., 155 Ct. Cl. 127, 293 F.2d 658 (1961).

5 U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 54

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 54. Indian lands used and occupied by two or more tribes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 150 to 160

A.L.R. Library

Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425

In order for an Indian tribe to establish ownership of land by aboriginal title, the tribe must generally show that it has used and occupied the lands to the exclusion of other Indian groups.[1] Areas that are continuously traversed by other tribes without permission of the claiming tribes cannot be deemed exclusive.[2] Ordinarily, when two or more tribes inhabit an area, no tribe will satisfy the requirement of showing exclusive use and occupancy as necessary to establish ownership by Indian title, but two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the exclusive nature of their use and occupancy and without defeating Indian title.[3]

Footnotes

1 Seneca Nation of Indians v. New York, 382 F.3d 245 (2d Cir. 2004); Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

2 Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

3 U.S. v. Pueblo of San Ildefonso, 206 Ct. Cl. 649, 513 F.2d 1383, 41 A.L.R. Fed. 405 (1975).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 55

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 55. Indian reservation land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 157 to 159

The President of the United States has the power to withdraw land from the public domain by executive order for the purpose of creating Indian reservations,[1] but an executive order makes the Indians no more than tenants at will of the government.[2] Under the Indian Reorganization Act,[3] the Secretary of the Interior also has the authority to proclaim new Indian reservations on acquired lands or to add land to a preexisting reservation.[4]

The creation of Indian reservations, either by treaty or executive order, gives the Indians the right to possess and occupy the lands for the uses and purposes designated[5] and is no more than a right of occupancy.[6] Indian reservation lands are owned by the United States and held in trust for the benefit of specific tribes or bands.[7] A treaty purportedly granting Indian reservation lands to particular tribes is not binding on the United States if never ratified by the Unites States Senate.[8]

The right of occupancy of reservation lands is sacred and cannot be interfered with or terminated except by the federal government[9] and is generally not subject to judicial review.[10] Only Congress can divest a reservation of its land[11] and diminish its boundaries.[12] Once a block of land is set aside for an Indian reservation, it retains its reservation status until Congress explicitly indicates otherwise,[13] and there is a presumption in favor of the continued existence of a reservation.[14] A federal statute authorizing or establishing Indian reservation land is, however, subject to subsequent contrary or varying federal enactments.[15]

Observation:

No formal cession or act setting apart a tract of land as an Indian reservation is necessary to create an Indian reservation; it is sufficient that from what has been done, there results a certain defined tract appropriated to this specific purpose.[16] A "de facto Indian reservation" is one where the federal government has treated the Indians as on a reservation even though the reservation was not created by a specific treaty, statute, or executive order.[17] Otherwise, the key to determining the reservation status of land is congressional intent.[18]

CUMULATIVE SUPPLEMENT

Cases:

Disestablishment of a reservation has never required any particular form of words, but it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Government's allotment agreement with Creek Nation, which established procedures for allotting 160-acre parcels to individual Tribe members, did not terminate Creek Reservation; even if allotment was first step in plan aimed at disestablishment of reservations, agreement did not evince anything like a present and total surrender of all tribal interests in affected lands, private land ownership within reservation boundaries was contemplated by statute, and Congress was able to allow tribes to continue to exercise governmental functions over land even if they no longer owned it communally. 18 U.S.C.A. § 1151(a). McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Congress's intrusions on Creek Nation's promised right of self-governance, during period in which Congress sought to pressure tribes to parcel their lands into smaller lots owned by individual tribe members, did not disestablish Creek Reservation; even though Congress abolished the Creeks tribal courts, required presidential approval of tribal ordinances, and empowered President to remove and replace principal chief, among other incursions on tribal autonomy, Congress left Tribe with significant sovereign functions over lands, such as power to collect taxes, operate schools, legislate, and oversee the federally mandated allotment process, Congress never withdrew its recognition of the tribal government, and eventually Congress enabled Creek government to resume previously suspended functions. Act of June 26, 1936, § 3, 49 Stat. 1967; Act of May 24, 1924, ch. 181, 43 Stat. 139; Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; Act of May 27, 1908, § 13, 35 Stat. 316; Five Civilized Tribes Act, §§ 6, 10, 11, 27, 28, 34 Stat. 139-141, 148; Curtis Act of 1898, § 28, 30 Stat. 504-505. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Indian casino was not located on state land, and thus individual Indian tribal officials, sued in their official capacities, were immune from state's suit under state nuisance law to enjoin operation of casino, despite state's contention that Supreme Court determined that casinos were not located on Indian lands because the Secretary of the Interior lacked authority to take land into trust on behalf of the Tribe under the Indian Reorganization Act (IRA); state could not raise a collateral challenge to the Secretary's authority to take lands into trust in unrelated lawsuit that was not brought under the Administrative Procedure

Act (APA), which would have been the proper method for challenging Secretary's actions. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465; 5 U.S.C.A. § 702. Alabama v. PCI Gaming Authority, 801 F.3d 1278 (11th Cir. 2015).

American Indian tribe's claims against Michigan state and municipal officials for failure to recognize reservation land were not barred by Indian Claims Commission Act, since claims were against state and local officials, rather than federal government, and claims alleged interference with tribal jurisdiction occurring after year 1946. Indian Claims Commission Act, § 1 et seq., 25 U.S.C.A. § 70 et seq. Little Traverse Bay Bands of Odawa Indians v. Whitmer, 365 F. Supp. 3d 865 (W.D. Mich. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Sioux Tribe of Indians v. U.S., 316 U.S. 317, 62 S. Ct. 1095, 86 L. Ed. 1501 (1942).
A particular treaty empowering the President to remove Indian tribes from specified reservations to other suitable places encompasses the power to expand the boundaries of the reservation. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

2 Confederated Bands of Ute Indians v. U.S., 330 U.S. 169, 67 S. Ct. 650, 91 L. Ed. 823 (1947).

3 § 5.

4 Yankton Sioux Tribe v. Podhradsky, 606 F.3d 985 (8th Cir. 2010).

5 Wilson v. Omaha Indian Tribe, 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979).

6 Northwestern Bands of Shoshone Indians v. U.S., 324 U.S. 335, 65 S. Ct. 690, 89 L. Ed. 985 (1945); U.S. v. Newmont USA Ltd., 504 F. Supp. 2d 1050 (E.D. Wash. 2007).

7 U.S. v. Jackson, 697 F.3d 670 (8th Cir. 2012); Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014), aff'd, 774 F.3d 1166 (8th Cir. 2014), petition for certiorari filed (U.S. May 27, 2015).

8 Robinson v. Salazar, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), appeal dismissed, (9th circ. 12-17151) (Feb. 26, 2013).

9 Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962).

10 Klamath and Moadoc Tribes v. U.S., 296 U.S. 244, 56 S. Ct. 212, 80 L. Ed. 202 (1935).

11 Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014), aff'd, 774 F.3d 1166 (8th Cir. 2014), petition for certiorari filed (U.S. May 27, 2015).

12 § 56.

13 Wisconsin v. Stockbridge-Munsee Community, 554 F.3d 657 (7th Cir. 2009); Yankton Sioux Tribe v. Podhradsky, 606 F.3d 985 (8th Cir.2010); Cayuga Indian Nation of New York v. Gould, 14 N.Y.3d 614, 904 N.Y.S.2d 312, 930 N.E.2d 233 (2010).

14 Yankton Sioux Tribe v. Podhradsky, 606 F.3d 985 (8th Cir.2010); Osage Nation v. Irby, 597 F.3d 1117 (10th Cir.2010).

15 Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012).

16 Nadeau v. Union Pac. R. Co., 253 U.S. 442, 40 S. Ct. 570, 64 L. Ed. 1002 (1920); Alaska Pacific Fisheries Co. v. U S, 248 U.S. 78, 39 S. Ct. 40, 63 L. Ed. 138, 4 Alaska Fed. 709 (1918).

17 Robinson v. Salazar, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), appeal dismissed, (9th circ. 12-17151) (Feb. 26, 2013).

18 Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001).

41 Am. Jur. 2d Indians; Native Americans § 56

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 56. Indian reservation land—Opening land or diminishing reservation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 157 to 159, 170

Congress has the power to diminish or disestablish a reservation although this will not be lightly inferred.[1] Language indicative of a congressional intent to diminish a reservation generally involves explicit references to cession and a sum certain payment but is not a prerequisite.[2] Diminution may be inferred when events surrounding the passage of an act, particularly the manner in which the transaction has been negotiated with the tribes involved and the tenor of legislative reports presented to Congress, unequivocally reveal a widely held contemporaneous understanding that the affected reservation would shrink as a result of proposed legislation.[3] To a lesser extent, diminution may also be inferred by Congress's own treatment of the affected areas, particularly in the years immediately following the opening, or by the manner in which the Bureau of Indian Affairs and local judicial authorities deal with unallotted open lands.[4]

When federal legislation authorizes the Secretary of the Interior to open acres of an Indian reservation for homesteading, the opening does not necessarily diminish the boundaries of an Indian reservation but may simply permit non-Indians to settle within existing reservation boundaries.[5]

When a surplus land act frees unallotted, opened Indian land of reservation status and thereby diminishes the reservation boundaries, the states have jurisdiction over such land,[6] but federal and tribal courts retain exclusive jurisdiction over the portions of the opened lands that remain Indian allotments or that are restored to reservation status by a subsequent Act of Congress.[7]

CUMULATIVE SUPPLEMENT

Cases:

Courts have no proper role in the adjustment of reservation borders. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Only Congress can divest a reservation of its land and diminish its boundaries. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Just as there is no particular form of words required when it comes to disestablishing a reservation, there are no particular form of words required when it comes to establishing one. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

Congress did not intend to diminish Omaha Indian Reservation when it enacted 1882 Act empowering Secretary of the Interior to sell Omaha Tribe's land west of railroad right-of-way; text of Act indicated that it merely opened reservation land to settlement and provided that uncertain future proceeds of settler purchases should be applied to Indians' benefit, thus allowing non-Indian settlers to own land on Reservation, text of earlier treaties confirmed that Congress did not intend to diminish Reservation, historical evidence did not unequivocally reveal widely held understanding that Reservation would shrink, and, although Tribe was almost entirely absent from the disputed territory for 120 years, and government officials had treated the disputed lands as Nebraska's, such facts could not overcome the statutory text. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Only Congress can divest an Indian reservation of its land and diminish its boundaries, and its intent to do so must be clear. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

To assess whether an Act of Congress diminished an Indian reservation, a court starts with the statutory text, for the most probative evidence of diminishment is the statutory language used to open the Indian lands, and the court also examines all the circumstances surrounding the opening of the reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Because of the turn-of-the-century assumption that Indian reservations were a thing of the past, many surplus land Acts did not clearly convey whether opened lands retained reservation status or were divested of all Indian interests, and, for that reason, the Supreme Court, in determining whether an Act of Congress diminished a reservation, would look to any unequivocal evidence of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the state in question. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Common textual indications of Congress' intent to diminish Indian reservation boundaries include explicit reference to cession or other language evidencing the present and total surrender of all tribal interests or an unconditional commitment from Congress to compensate the Indian tribe for its opened land. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Language providing for the total surrender of tribal claims in exchange for a fixed payment evinces Congress' intent to diminish an Indian reservation, and creates an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

A statutory provision restoring portions of an Indian reservation to "the public domain" signifies diminishment of the reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

The subsequent demographic history of opened lands serves as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers, for purposes of determining whether an Act of Congress diminished a reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

The United States' treatment of the affected areas, particularly in the years immediately following the opening of Indian reservation land to non-Indian settlers, has some evidentiary value when determining whether an Act of Congress diminished a reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Although evidence of the subsequent demographic history of opened lands, and of the United States' treatment of the affected areas, particularly in the years immediately following the opening of Indian reservation land to non-Indian settlers, might reinforce a finding of diminishment or nondiminishment based on the text of an Act of Congress, the Supreme Court does not rely solely on this consideration to find diminishment. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Evidence of the changing demographics of disputed land is the least compelling evidence in the analysis of whether an Act of Congress has diminished an Indian reservation, for every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the Indian character of the reservation, but not every surplus land Act diminished the affected reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

Evidence of the subsequent treatment of the disputed land by government officials has limited interpretive value in determining whether an Act of Congress diminished an Indian reservation. Nebraska v. Parker, 136 S. Ct. 1072 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Wisconsin v. Stockbridge-Munsee Community, 554 F.3d 657 (7th Cir. 2009); Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994 (8th Cir. 2010); Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010); Cayuga Indian Nation of New York v. Gould, 14 N.Y.3d 614, 904 N.Y.S.2d 312, 930 N.E.2d 233 (2010).
Congress can unilaterally alter an Indian reservation's boundaries. U.S. v. Jackson, 697 F.3d 670 (8th Cir. 2012).
An 1882 Act ratifying the sale of certain tribal lands to non-Indian settlers did not clearly evince Congress' intent to change reservation boundaries. Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014), petition for certiorari filed (U.S. May 27, 2015).
The reservation's boundaries were diminished by allotments of fee-patented land to tribe members who subsequently sold parcels to non-Indians. Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 606 F.3d 895 (8th Cir. 2010).

2 South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998); Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014), petition for certiorari filed (U.S. May 27, 2015); Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).
A nearly conclusive, or almost insurmountable, presumption of diminishment arises. U.S. v. Jackson, 697 F.3d 670 (8th Cir. 2012).

3 Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); Wisconsin v. Stockbridge-Munsee Community, 554 F.3d 657 (7th Cir. 2009).
The effect of an allotment depends on the language of the act and the circumstances of its passage. Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).

4 Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

5 Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).
The surplus land act simply offered non-Indians the opportunity to purchase land within established reservation boundaries. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998).

6 South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998); Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

7 Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

41 Am. Jur. 2d Indians; Native Americans § 57

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

A. In General

§ 57. Indian lands subject to Quiet Title Act; exemption

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 342

A provision of the Quiet Title Act exempts trust or restricted Indian lands from the operation of the Act,[1] effective solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians.[2] The exemption does not apply to actions brought by Indian tribes[3] and does not apply to a challenge to a decision of the Secretary of Interior, under the Administrative Procedure Act, relating to taking land in trust as Indian trust land, since the plaintiff does not assert title to land.[4]

Footnotes

1 28 U.S.C.A. § 2409a(a).

2 U.S. v. Mottaz, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986); Governor of Kansas v. Kempthorne, 516 F.3d 833 (10th Cir. 2008).

3 Western Shoshone Nat. Council v. U.S., 415 F. Supp. 2d 1201 (D. Nev. 2006), aff'd, 274 Fed. Appx. 573 (9th Cir. 2008) (limitations bar applied).

4 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012).

End of Document

41 Am. Jur. 2d Indians; Native Americans VI B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

B. Hunting, Fishing, and Wildlife

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 350 to 368

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 350 to 368

End of Document

41 Am. Jur. 2d Indians; Native Americans § 58

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

B. Hunting, Fishing, and Wildlife

§ 58. Indian rights to hunt and fish on reservation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 350 to 368

Indian tribes generally enjoy exclusive treaty rights to hunt and fish on lands reserved to them, whether or not these rights are expressly mentioned in the treaty, unless such rights have clearly been relinquished by treaty or modified by Congress.[1] The treaty right is tribal but may be asserted by individual tribe members.[2] The sovereign right of an Indian tribe includes the right to regulate the use of its wildlife and natural resources by tribe members.[3]

The federal statute granting jurisdiction to states over certain offenses committed in certain Indian country areas by or against Indians specifically provides that it does not deprive any Indian of rights afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof.[4] The statute protects against state invasion of the right of Indians to hunt and fish on their reservation.[5]

Caution:

Indians' right to hunt and fish on the reservation is not free from state interference in the State's exercise of its right to enact and enforce reasonable regulations pursuant to its police power to conserve important natural resources.[6]

CUMULATIVE SUPPLEMENT

Cases:

Mixed-blood Utes could not convert their hunting and fishing rights on Uintah and Ouray Reservation into separate tribal rights of non-federally-recognized Uintah Valley Shoshone Tribe. 25 U.S.C.A. § 677 et seq. United States v. Uintah Valley Shoshone Tribe, 946 F.3d 1216 (10th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); U.S. v. Fox, 573 F.3d 1050 (10th Cir. 2009).
As to federal regulations regarding Indian fishing and hunting, see 25 C.F.R. §§ 241.1 et seq.

2 U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015).

3 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

4 18 U.S.C.A. § 1162(b).

5 Metlakatla Indian Community, Annette Islands Reserve v. Egan, 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962); Serian v. State, 588 So. 2d 251 (Fla. 4th DCA 1991).

6 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

41 Am. Jur. 2d Indians; Native Americans § 59

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

B. Hunting, Fishing, and Wildlife

§ 59. Indian rights to hunt and fish off-reservation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 350 to 368

Forms

Am. Jur. Pleading and Practice Forms, Indians, American § 38 (Complaint or petition—For conversion of fish—Against state—Fish wrongfully confiscated from member of Indian tribe by state fish and game department)
Federal Procedural Forms § 41:73 (Complaint in district court—For declaratory relief—Right to hunt and fish on property ceded to United States under treaty [28 U.S.C.A. § 1362; 28 U.S.C.A. § 2201])

An Indian tribe's rights to hunt, fish, and gather on ceded state land are not irreconcilable with a state's sovereignty over the natural resources in the state; rather, Indian rights on ceded land can coexist with state management of natural resources[1] or federal environmental regulatory provisions.[2] States have authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.[3] The State has the power to impose on Indians equally with others such restrictions of a purely regulatory nature outside the reservation as are reasonable and necessary for conservation.[4]

Treaties may preserve tribal off-reservation fishing rights in specific fisheries,[5] or tribal aboriginal hunting and fishing rights on non-Indian land may be established by a showing of continuous use and occupancy and a showing of exclusive use.[6]

Caution:

Laches may bar tribal claims of exclusive off-reservation hunting and fishing rights.[7]

CUMULATIVE SUPPLEMENT

Cases:

Wyoming's admission to the Union did not abrogate the Crow Tribe of Indians' right under 1868 treaty with United States to hunt on unoccupied lands of the United States; Wyoming Statehood Act made no mention of Indian treaty rights, there was no evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so, but, rather, the treaty itself defined the circumstances in which the right would expire, and statehood was not one of them. 15 Stat. 649, 1868 WL 24283. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

The presence of exploitative mining and logging operations in the Bighorn National Forest did not amount to settlement of the sort that the Crow Tribe of Indians would have understood as rendering the forest occupied within the meaning of the 1868 Treaty between the United States of America and the Crow Tribe of Indians, which guaranteed the Tribe the right to hunt on unoccupied lands of the United States, and thus, mining and logging of the forest lands did not abrogate the Tribe's treaty right to hunt. 15 Stat. 649, 1868 WL 24283. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

American Indian tribe lacked Article III standing to bring claim against state of Maine and various state officials, in response to opinion of state attorney general regarding regulatory jurisdiction of tribe and state related to hunting and fishing on stretch of river, seeking declaratory judgment clarifying tribal fishing rights on river; opinion did not pose threat to tribe's fishing rights, as it did not address or mention scope of those rights, and no member of tribe had sustained any injury related to sustenance fishing practices in response to opinion. U.S. Const. art. 3, § 2, cl. 1. Penobscot Nation v. Mills, 861 F.3d 324 (1st Cir. 2017).

In Indian tribe's subproceeding requesting a determination of other tribes' Pacific Ocean customary fishing grounds, alleging that those tribes' entry into its fishing grounds would disrupt its treaty fishery, other tribes had burden to support its claim of entitlement to fish in disputed grounds. U.S. v. Washington, 88 F. Supp. 3d 1203 (W.D. Wash. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

2 U.S. v. Gotchnik, 222 F.3d 506 (8th Cir. 2000).
As to federal regulations regarding Indian off-reservation treaty fishing, see 25 C.F.R. §§ 249.1 et seq.

A tribe was not exempt for traditional whale hunting under the Marine Mammal Protection Act. Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004).

3 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).
Fishing rights are reserved to Indians on ceded lands, subject to state game laws. People of State of New York ex rel. Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed. 1166 (1916).

4 Tulee v. State of Washington, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

5 U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010).
The Lummi Nation's usual and accustomed fishing grounds were established, in part, for purposes of treaties governing off-reservation fishing. U.S. v. Washington, 20 F. Supp. 3d 986 (W.D. Wash. 2013).

6 Native Village of Eyak v. Blank, 688 F.3d 619 (9th Cir. 2012), cert. denied, 134 S. Ct. 51, 187 L. Ed. 2d 23 (2013).

7 Ottawa Tribe of Oklahoma v. Ohio Dept. of Natural Resources, 541 F. Supp. 2d 971 (N.D. Ohio 2008), judgment aff'd, 577 F.3d 634 (6th Cir. 2009).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 60

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

B. Hunting, Fishing, and Wildlife

§ 60. Nonmembers' rights to hunt and fish on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 350 to 368

The sovereign right of an Indian tribe includes the right to regulate the use of its wildlife and natural resources by nonmembers of the tribe,[1] except as applied to land held in fee simple by nonmembers of the tribe, unless nonmember hunting and fishing so threatens the tribe's political or economic security as to justify tribal regulation.[2]

Absent a state interest that would justify the assertion of concurrent regulatory authority, a state is preempted by operation of federal law from applying its own laws to hunting and fishing by nonmembers on reservation land[3] or land owned by the tribe or held by the United States in trust for the tribe,[4] but conservation purposes may warrant state regulation.[5]

A state may, by regulation, restrict certain on-reservation activities to tribal members.[6]

Footnotes

1 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

2 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

3 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

4 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

5 Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978).

6 Roberts v. Hagener, 287 Fed. Appx. 586 (9th Cir. 2008).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 61

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

B. Hunting, Fishing, and Wildlife

§ 61. Eagles protected from Indian hunting; religious exception

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 351

The Bald and Golden Eagle Protection Act[1] divests members of Indian tribes of the treaty right to hunt bald or golden eagles on lands reserved to the tribe, subject to a specified limited exception for the religious purposes of Indian tribes upon a determination that such acts are compatible with the goal of preservation of such eagles.[2] The exception is not to be construed to allow permits to non-Indians or nontreaty Indians.[3]

For purposes of a religious freedom challenge to the Act, protecting bald eagles qualifies as a compelling governmental interest.[4] The Act's permit process for taking eagles for Native American religious purposes is not administered in a manner that renders it futile and without exception and thus is not a substantial burden on tribal religious practices.[5]

Footnotes

1 16 U.S.C.A. §§ 668 et seq.

2 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

3 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

4 McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014); U.S. v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008).

5 U.S. v. Friday, 525 F.3d 938 (10th Cir. 2008).

End of Document

41 Am. Jur. 2d Indians; Native Americans VI C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 192 to 195

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 192 to 195

End of Document

41 Am. Jur. 2d Indians; Native Americans § 62

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

§ 62. Authority for development of tribal mineral resources

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 192, 194

The Indian Mineral Development Act of 1982 permits Indian tribes to enter into certain agreements for the disposition or development of tribal-mineral resources,[1] subject to the approval of the Secretary of the Interior and any limitation or provision contained in the tribe's constitution or charter.[2]

The district courts of the United States have jurisdiction to review the Secretary's disapproval of an Indian lands minerals agreement, and the court must determine the matter de novo, subject to the Secretary's burden to sustain the disapproval.[3]

Footnotes

1 25 U.S.C.A. §§ 2101 to 2108.

2 25 U.S.C.A. § 2102(a).

3 25 U.S.C.A. § 2103(d).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 63

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

§ 63. Surface mining and reclamation on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 192

The Surface Mining Control and Reclamation Act of 1977[1] is applicable to Indian lands,[2] providing that all surface coal mining operations on Indian lands must comply with requirements at least as stringent as those imposed by specified sections of the Act.[3]

The Act cannot be applied retroactively to Indian agreements predating its effective date.[4]

CUMULATIVE SUPPLEMENT

Cases:

Heirs' claim alleging violation of the Fort Berthold Mineral Leasing Act and an illegal exaction, and aspects of breach of fiduciary duty claim premised upon such Act, were not prudentially exhausted, and would be stayed; Bureau of Indian Affairs (BIA) was seeking an administrative determination that heirs' father did not own the mineral rights attendant to the land on which oil lease was situated, and if father did not own the mineral rights, then neither did his heirs, meaning heirs' claims would be moot. Fredericks v. United States, 125 Fed. Cl. 404 (2016).

[END OF SUPPLEMENT]

Footnotes

1 30 U.S.C.A. §§ 1201 et seq.

2 30 U.S.C.A. § 1300.
As to regulations on tribal surface mining and reclamation, see 25 C.F.R. §§ 216.1 et seq.

3 30 U.S.C.A. § 1300(c), (d).

4 U.S. v. Navajo Nation, 556 U.S. 287, 129 S. Ct. 1547, 173 L. Ed. 2d 429 (2009).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 64

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

§ 64. Taxes related to minerals, oil, and gas on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 192, 194

An Indian tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land, even though the tax falls on nonmembers of the tribe, as long as the tribe's tax legislation does not infringe upon the national interest in maintaining a free flow of interstate trade.[1] A tribe's power to impose taxes on the value of mineral interests and on gross receipts of oil and gas leases on lands in its reservation exists despite extensive federal regulation of oil and gas activities on reservations, without review and approval by the Secretary of the Interior.[2]

The Indian Mineral Leasing Act[3] does not preclude an Indian tribe from imposing property and business activities taxes on mineral lessees,[4] and federal law does not preempt a state's imposition of additional severance taxes,[5] absent interference with the policies underlying the Act.[6] A state cannot tax Indian royalty income from oil and gas leases issued to non-Indian lessees pursuant to the Act.[7]

Footnotes

1 Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), judgment aff'd, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

2 Peabody Coal Co. v. Navajo Nation, 75 F.3d 457 (9th Cir. 1996); Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983).

3 § 65.

4 Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597 (9th Cir. 1984), judgment aff'd, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985).

5 Montana v. Crow Tribe of Indians, 523 U.S. 696, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

6 Crow Tribe of Indians v. State of Mont., 819 F.2d 895 (9th Cir. 1987), judgment aff'd, 484 U.S. 997, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988).

7 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 65

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

§ 65. Authority for mineral leasing of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 193

A.L.R. Library

Application of Indian Mineral Leasing Act (IMLA) and Its Implementing Regulations, 196 A.L.R. Fed. 619

Under the Indian Mineral Leasing Act, Congress has provided that allotted Indian lands may be leased by the allottee for mining purposes, and if the allottee is deceased with heirs undetermined or not located, allotted lands may be leased by the Secretary of the Interior.[1] The tribal council may also lease unallotted lands for mining purposes, subject to approval by the Secretary,[2] and may lease for oil and gas mining purposes.[3] Statutes may not be applied retroactively as an independent source of law imposing duties on the Secretary with respect to approval of amendments to a previously negotiated tribal mineral lease.[4]

Under the Act, proceeds from oil and gas leases are restricted in their application to expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of the Indians.[5]

The major purposes of the Act are to secure for Indians the greatest return for their property, to bring all mineral leasing matters in harmony with the Indian Reorganization Act,[6] and to provide Indian tribes with badly needed revenue.[7]

Observation:

The United States, through the Secretary of the Interior, owes fiduciary obligations to Indians with respect to the making and administering of leases and the collection and payment of royalties on Indians' mineral lands leased for oil and gas purposes,[8] but the government has no duty to "maximize" oil and gas revenue from such production.[9]

The Secretary is empowered to cancel a lease on allotted land when the lessee has violated any of the terms and conditions of the lease, but there is no justification for concluding that the severe sanction of cancellation of a lease is the only relief for all breaches of lease terms, and there is nothing in the regulatory scheme that precludes Indians from seeking judicial relief for alleged violations of leases.[10]

CUMULATIVE SUPPLEMENT

Cases:

Bureau of Land Management's (BLM) tribal consultation meetings with Indian tribes held after publication of proposed hydraulic fracturing rule were inconsistent with Department of Interior's (DOI) policies and procedures requiring extensive government-to-government consultation between DOI and Tribal officials early in planning process for new rules that would impact tribes, and thus BLM's decision publishing new rule was arbitrary and capricious, where BLM's efforts reflected little more than was offered to public in general, consultation meetings with tribes were simply information and outreach sessions regarding proposed rule, BLM spent more than a year developing proposed rule before initiating any consultation with tribes, final rule contained only two changes from proposed rule as a result of tribal consultations, and BLM summarily dismissed legitimate tribal concerns regarding sovereignty and their desire to be able to opt out and provide their own hydraulic fracturing rules. Wyoming v. United States Department of the Interior, 136 F. Supp. 3d 1317 (D. Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 25 U.S.C.A. § 396.
As to regulations on tribal mineral leases on allotted and restricted lands, see 25 C.F.R. §§ 212.1 et seq., 213.1 et seq.

2 25 U.S.C.A. § 396a.
As to regulations on tribal mineral leases, see 25 C.F.R. §§ 200.11 et seq., 211.1 et seq., 214.1 et seq., 215.1 et seq.

3 25 U.S.C.A. § 398.
As to regulations on tribal oil and gas mining leases, see 25 C.F.R. §§ 225.1 et seq., 226.1 et seq., 227.1 et seq.

4 U.S. v. Navajo Nation, 556 U.S. 287, 129 S. Ct. 1547, 173 L. Ed. 2d 429 (2009).

5 25 U.S.C.A. § 398b.

6 Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597 (9th Cir. 1984), judgment aff'd, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985).

7 Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

8 Pawnee v. U.S., 830 F.2d 187 (Fed. Cir. 1987).

9 Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. U.S., 56 Fed. Cl. 639 (2003).

10 Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 66

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

C. Minerals, Oil, Gas, and Timber on Indian Lands

§ 66. Timber on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 195

Indians holding a fee simple in their land are not under any restriction on their right to cut and sell the timber on their land,[1] but Indians do not have a right to compensation for timber sold by the federal government where the Indians have no proprietary ownership of the timberland, and the federal government has not recognized their right to unrestricted possession, occupancy, and use of the land.[2]

Indians are the beneficial owners of the land on Indian reservations and of the timber standing upon that land, subject to the plenary power of control by the United States.[3] An Indian tribe's regulatory authority over reservation lands includes the power to regulate timber harvesting to protect culturally and historically significant sites.[4]

Funds collected by the government from sales of Indian timber are trust funds, and the proper beneficiaries can sue if the funds illegally leave the treasury,[5] or if the government sells a tribe's timber assets for less than their full value, breaching its fiduciary duty.[6]

Indians' free exercise of religion under the First Amendment does not forbid the federal government from permitting timber harvesting in a portion of a national forest traditionally used by American Indians to conduct a wide variety of specific rituals for the purpose of personal spiritual development.[7]

The timber on restricted Indian allotments, whereby land is held under a trust for Indians or other patent containing restrictions on alienations, may be sold by the allottees with the consent of the Secretary of the Interior.[8] The timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use, under regulations prescribed by the Secretary.[9]

CUMULATIVE SUPPLEMENT

Cases:

Payments to confederation of tribes for tribal timber were equivalent to payments to Bureau of Indian Affairs (BIA) for purposes of satisfying provision, of contracts between tribes and tribal forest enterprise wholly owned by tribes under which tribal enterprise purchased timber of which tribes were beneficial owners and the legal title to which federal government held in trust for tribes, which provided that title to timber did not pass to enterprise until BIA was paid; method of handling invoices and payments for timber reflected belief shared by tribes and BIA that, functionally, payments were owed to tribes, not BIA, with tribes themselves administering invoicing process and tracking and receiving payments. Confederated Tribes of Warms Springs Reservation of Oregon v. Vanport International, Inc., 428 F. Supp. 3d 384 (D. Or. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Paine Lumber Co., 206 U.S. 467, 27 S. Ct. 697, 51 L. Ed. 1139 (1907).

2 Tee-Hit-Ton Indians v. U.S., 15 Alaska 418, 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314 (1955).

3 U.S. v. Algoma Lumber Co, 305 U.S. 415, 59 S. Ct. 267, 83 L. Ed. 260 (1939).

4 Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001).

5 Short v. U.S., 719 F.2d 1133 (Fed. Cir. 1983).

6 Confederated Tribes of Warm Springs Reservation of Oregon v. U.S., 248 F.3d 1365 (Fed. Cir. 2001).

7 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

8 25 U.S.C.A. § 406.

9 25 U.S.C.A. § 407.

41 Am. Jur. 2d Indians; Native Americans VI D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

D. Allotment of Indian Lands

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 162 to 170

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 162 to 170

End of Document

41 Am. Jur. 2d Indians; Native Americans § 67

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

D. Allotment of Indian Lands

§ 67. Indian lands allotment authority and limitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 162 to 170

An "allotment" is a term of art in Indian law meaning a selection of specific land awarded to an individual allottee from a common holding.[1] Federal law governs allotments, not state law,[2] and federal policy no longer favors the allotment of Indian land.[3]

The Indian Reorganization Act (IRA) specifically provides that on and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, act of Congress, executive order, purchase, or otherwise, will be allotted in severalty to any Indian,[4] and the Indian General Allotment Act (IGAA) no longer provides for the allotment of reservation lands, providing only for the allotment of Indian lands other than reservation lands.[5]

Under the IGAA, an Indian, other than an Alaskan native, not living on a reservation or whose tribe has not been provided with a reservation, who settles upon otherwise unappropriated land of the United States, is entitled to an allotment of that land.[6] An Indian entitled to an allotment under existing law who settles upon unappropriated United States land is also entitled to an allotment of the land upon which the Indian has settled.[7]

The Secretary of the Interior is authorized under the IGAA to make allotments within the national forests in conformity with the general allotment laws to any Indian occupying, living on, or having improvements on land included within any such national forest who has not received an allotment by other specified methods.[8]

CUMULATIVE SUPPLEMENT

Cases:

In rem nature of property owners' action to quiet title to portion of tract, purchased by tribe with an eye to asking the federal government to take the land into trust and add it to their existing reservation, did not, by itself, establish that suit was outside scope of tribe's sovereign immunity; *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687, on which state supreme court relied in finding sovereign immunity presented no barrier to the action, did not address the scope of tribal sovereign immunity, but instead addressed a question of statutory interpretation of the Indian General Allotment Act of 1887. Indian General Allotment Act, § 6, 25 U.S.C.A. § 349. Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Affiliated Ute Citizens of Utah v. U. S., 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972); Begay v. Public Service Co. of N.M., 710 F. Supp. 2d 1161 (D.N.M. 2010); Magnan v. State, 2009 OK CR 16, 207 P.3d 397 (Okla. Crim. App. 2009).

2 Nahno-Lopez v. Houser, 625 F.3d 1279 (10th Cir. 2010).

3 Thurston County, State of Nebraska v. Andrus, 586 F.2d 1212 (8th Cir. 1978).

4 25 U.S.C.A. § 461.
The IRA did not reverse any previous allotment of fee-patented lands. Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002).

5 25 U.S.C.A. §§ 334 et seq.

6 25 U.S.C.A. § 334.
Alaskan native allotments and selections are controlled by the Alaskan Native Claims Settlement Act (43 U.S.C.A. §§ 1601 et seq.), and the implementation of Alaskan Native Claims Settlement Act, and Alaskan Statehood Act (43 U.S.C.A. §§ 1631 et seq.).

7 25 U.S.C.A. § 336.

8 25 U.S.C.A. § 337.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 68

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

D. Allotment of Indian Lands

§ 68. Nature of Indian allotment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 162, 168, 170

Under the Indian General Allotment Act,[1] the United States retains title to the allotted lands in trust for the benefit of the allottees,[2] and no legal title to the land vests in the allottee until the patent is received.[3] The allottee is issued a patent to be held in trust, whereby the federal government holds the land in trust for a specified number of years,[4] thus constituting an allotment certificate,[5] subject to restrictions on the alienation of allotted Indian lands.[6] At the expiration of the trust period, the lands may be conveyed to the allottee by patent in fee.[7] Once allotted in severalty, tribal land is no longer part of the reservation and is no longer tribal land.[8]

The decisions of the allotting authorities as to enrollment and allotment are conclusive and not subject to collateral attack.[9] All reasonable presumptions must be indulged in support of their decisions,[10] but a discretionary decision, misapprehending the legal rights of the parties, is subject to review and correction.[11] It is not arbitrary, capricious, or an abuse of discretion to deny an allotment of land which does not meet statutory requirements.[12]

Footnotes

1 § 67.

2 U. S. v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980); Tooahnippah v. Hickel, 397 U.S. 598, 90 S. Ct. 1316, 25 L. Ed. 2d 600 (1970); Arizona Public Service Co. v. E.P.A., 211 F.3d 1280 (D.C. Cir. 2000).
As to the extension of the trust or restricted status of certain Indian lands, see 25 C.F.R. Ch. 1, App.

3 U.S. v. Jackson, 280 U.S. 183, 50 S. Ct. 143, 74 L. Ed. 361 (1930); U.S. v. Newmont USA Ltd., 504 F. Supp. 2d 1050 (E.D. Wash. 2007).

4 25 U.S.C.A. § 348.

As to regulations regarding the issuance of patents in fee, certificates of competency, and related allotment matters, see 25 C.F.R. §§ 152.3 et seq.

5 Squire v. Capoeman, 351 U.S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

6 § 79.

7 25 U.S.C.A. § 349.

As to alienation of fee land by the allottee, see § 73.

8 U.S. v. Newmont USA Ltd., 504 F. Supp. 2d 1050 (E.D. Wash. 2007); Wisconsin v. Stockbridge-Munsee Community, 366 F. Supp. 2d 698 (E.D. Wis. 2004), judgment aff'd, 554 F.3d 657 (7th Cir. 2009).

9 U.S. v. Atkins, 260 U.S. 220, 43 S. Ct. 78, 67 L. Ed. 224 (1922); U.S. v. Wildcat, 244 U.S. 111, 37 S. Ct. 561, 61 L. Ed. 1024 (1917).

10 Ross v. Stewart, 227 U.S. 530, 33 S. Ct. 345, 57 L. Ed. 626 (1913).

11 Arenas v. U.S., 322 U.S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363 (1944).

12 Saulque v. U.S., 663 F.2d 968 (9th Cir. 1981).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 69

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

D. Allotment of Indian Lands

§ 69. Right of action under Indian allotment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 162

Under the Indian General Allotment Act (IGAA),[1] all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under federal law, or who claim to be so entitled or to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled under federal law, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper federal district court.[2]

Caution:

The Taylor Grazing Act[3] does not give a federal district court jurisdiction to review the Interior Secretary's classification of lands prior to granting an allotment.[4]

Practice Tip:

The United States is an indispensable party to an action brought under the IGAA.[5] The return of allotted land may not be ordered unless persons in possession are afforded the opportunity to participate in the suit as parties.[6]

Footnotes

1 § 67.

2 25 U.S.C.A. § 345.
As to proceedings in actions for allotments, see 25 U.S.C.A. § 346.

3 43 U.S.C.A. § 315f.

4 Pallin v. U.S., 496 F.2d 27 (9th Cir. 1974).

5 Nichols v. Rysavy, 809 F.2d 1317, 7 Fed. R. Serv. 3d 28 (8th Cir. 1987).

6 Antoine v. U.S., 637 F.2d 1177 (8th Cir. 1981).

End of Document

41 Am. Jur. 2d Indians; Native Americans VI E Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 153, 154, 171, 173 to 175

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 153, 154, 171, 173 to 175

End of Document

41 Am. Jur. 2d Indians; Native Americans § 70

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

1. Alienation of Indian Lands; in General

§ 70. Federal consent required for alienation of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173

Forms

Federal Procedural Forms § 41:63 (Complaint in district court—For declaratory judgment and damages in connection with unlawful cession of Indian lands to state [28 U.S.C.A. §§ 1331, 1362, 2201; Fed. R. Civ. P. 8(a), 57])

Since Indian title in tribal lands is only a right of occupancy, the fee being in the United States,[1] an Indian nation or tribe is generally incapable of alienating such lands except to the United States or with its consent.[2] Since the tribe cannot sell, neither can the individual members.[3]

Footnotes

1 § 52.

2 As to regulations regarding sales, exchanges, and conveyances of trust or restricted lands, see 25 C.F.R. §§ 152.17 et seq.
Williams v. City of Chicago, 242 U.S. 434, 37 S. Ct. 142, 61 L. Ed. 414 (1917); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221 (D. Nev. 2014).

Indian trust property cannot be conveyed without the consent of the Secretary of the Interior. In re Marriage of Baker, 2010 MT 124, 356 Mont. 363, 234 P.3d 70 (2010).

An Indian tribe has no independent power to convey its aboriginal title to another. Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448 (W.D. N.Y. 2002), judgment aff'd, 382 F.3d 245 (2d Cir. 2004).

3 Pigeon v. Buck, 237 U.S. 386, 35 S. Ct. 608, 59 L. Ed. 1007 (1915).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 71

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

1. Alienation of Indian Lands; in General

§ 71. Federal government's alienation of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173

The federal government possesses the power to convey the fee to lands occupied by Indian tribes, although the grantee takes only the naked fee and cannot disturb the occupancy of the Indians, since such occupancy can only be interfered with or determined by the United States.[1]

Observation:

The federal government, in its dealings with Indian tribal property, acts in a fiduciary capacity and may not give to others the tribal lands which it holds in trust without rendering, or assuming an obligation to render, just compensation for them; however, for purposes of the Fifth Amendment prohibition against taking private property without just compensation, this principle does not create property rights where none would otherwise exist but rather presupposes that the government has interfered with existing tribal property interests.[2]

Footnotes

1 U.S. v. Cherokee Nation of Oklahoma, 480 U.S. 700, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987); State of Wisconsin v. Hitchcock, 201 U.S. 202, 26 S. Ct. 498, 50 L. Ed. 727 (1906).

2 U.S. v. Cherokee Nation of Oklahoma, 480 U.S. 700, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987).
As to the acquisition of Indian land by the federal government, generally, see §§ 75, 76.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 72

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

1. Alienation of Indian Lands; in General

§ 72. Sale or exchange of Indian lands under Consolidation Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173

The Indian Land Consolidation Act[1] provides that any Indian tribe can, with the approval of the Secretary of the Interior, adopt a land consolidation plan providing for the sale or exchange of any tribal lands or interest in lands for the purpose of eliminating undivided, fractional interests in Indian trust or restricted lands or consolidating its tribal landholdings provided that the statutory conditions are met.[2]

Under the Fractional Interest Acquisition Program,[3] the Secretary had discretion to acquire, with the consent of the owner or heir, any fractional interest in trust or restricted lands.[4]

A qualified tribe under the Act is one that exercises jurisdiction over the land.[5]

A tribe's rights under the Act do not apply to land in another state even as to property owned by tribe members.[6]

Footnotes

1 25 U.S.C.A. §§ 2201 et seq.
2 25 U.S.C.A. § 2203.
3 25 U.S.C.A. §§ 2212 et seq.
4 25 U.S.C.A. § 2212(a)(1).
5 Miami Tribe of Oklahoma v. U.S., 374 F. Supp. 2d 934 (D. Kan. 2005).

6 Miami Tribe Of Oklahoma v. U.S., 656 F.3d 1129 (10th Cir. 2011).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 73

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

1. Alienation of Indian Lands; in General

§ 73. Allotted Indian lands subject to alienation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 175

Restrictions on the alienation of allotted Indian lands apply to allotted lands held in trust by the United States or held in fee by individual Indians but subject to restraints on alienation and reversionary interests in the United States,[1] but restrictions on the sale of allotted land are removed by statute[2] when the Indian allottee is found competent and issued a patent in fee simple.[3] Thus, when the Indian tribe or tribal members convey a parcel of allotted fee land to non-Indians, the tribe loses any former right of absolute and exclusive use and occupation of conveyed lands, including regulatory jurisdiction over use of the land by others.[4] Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it, including authority to prevent the land's sale.[5]

When an Indian makes a conveyance of allotted land without vested title, the grantor's subsequent acquisition of title through the issue of a patent does not vest title in the grantee by estoppel.[6]

Footnotes

1 § 79.

2 25 U.S.C.A. § 349.

3 County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).
As to regulations regarding the issuance of patents in fee, certificates of competency, and related allotment matters, see 25 C.F.R. §§ 152.3 et seq.

4 Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).

The reservation's boundaries were diminished by allotments of fee-patented land to tribe members who subsequently sold parcels to non-Indians. Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 606 F.3d 895 (8th Cir. 2010).

The alienation of allotted land divests the tribal court of exclusive jurisdiction over a dispute involving the patented fee land. McGuire v. Aberle, 2013 SD 5, 826 N.W.2d 353 (S.D. 2013).

An Indian landowner's conveyance of surface rights in allotted land extinguished all Indian lands restrictions. Magnan v. State, 2009 OK CR 16, 207 P.3d 397 (Okla. Crim. App. 2009).

5 Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).

6 Mullen v. Simmons, 234 U.S. 192, 34 S. Ct. 857, 58 L. Ed. 1274 (1914); Nixon v. Johnson, 90 Idaho 239, 409 P.2d 405 (1965).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 74

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

1. Alienation of Indian Lands; in General

§ 74. Allotted Indian lands subject to alienation—State condemnation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173, 174

Forms

Federal Procedural Forms § 41:63 (Complaint in district court—For declaratory judgment and damages in connection with unlawful cession of Indian lands to state [28 U.S.C.A. §§ 1331, 1362, 2201; Fed. R. Civ. P. 8(a), 57])

As provided by federal statute, lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the state or territory where located; in the same manner, lands owned in fee may be condemned.[1] Pursuant to this provision, federal courts have jurisdiction over actions to condemn rights-of-way over allotted Indian land without the consent of the Secretary of the Interior or the Indians.[2]

Observation:

This provision does not authorize a state or local government to "condemn" allotted Indian trust lands by physical occupation, as the basis for an "inverse condemnation" action, but requires a formal condemnation proceeding.[3]

Footnotes

1 25 U.S.C.A. § 357.
Regulations require notice to the Bureau of Indian Affairs regarding condemnations of rights-of-way over Indian lands, see 25 C.F.R. § 169.21.
As to the allotment of Indian land, generally, see §§ 67 to 69.

2 Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982).

3 U.S. v. Clarke, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 75

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

2. Acquisition of Indian Lands by Federal Government

§ 75. Federal power of condemnation of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 153, 154

By statute, Indian lands are subject to condemnation by the United States to public uses, upon making just compensation,[1] as within the power of Congress.[2]

In determining that the United States' acquisition of the land from an Indian nation constitutes a taking compensable, the court properly inquires into whether Congress has made a good-faith effort to give the tribe the full value of the land, determining the adequacy of the consideration the government has given.[3]

If the acquisition constitutes a taking, the government is liable not only for the value of the property taken but also for the interest from the date of the taking.[4] Compensation should be based on the value of the property at the time of disposal rather than the value at the time when suit begins.[5]

Footnotes

1 25 U.S.C.A. § 341.

2 U. S. v. Sioux Nation of Indians, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980).
As to eminent domain with regard to Indian lands, generally, see Am. Jur. 2d, Eminent Domain § 91.

3 U. S. v. Sioux Nation of Indians, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980).

4 U.S. v. Klamath and Moadoc Tribes, 304 U.S. 119, 58 S. Ct. 799, 82 L. Ed. 1219 (1938); Sioux Nation of Indians v. U. S., 220 Ct. Cl. 442, 601 F.2d 1157 (1979), judgment aff'd, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980).

5 Creek Nation v. U.S., 302 U.S. 620, 58 S. Ct. 384, 82 L. Ed. 482 (1938); U.S. v. Creek Nation, 295 U.S. 103, 55 S. Ct. 681, 79 L. Ed. 1331 (1935).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 76

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

2. Acquisition of Indian Lands by Federal Government

§ 76. Alaskan Native Claims Settlement Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 171

The Alaska Native Claims Settlement Act (ANCSA) provides for the settlement of all claims by natives of Alaska based on aboriginal land claims by establishing the Alaska Native Fund and regional corporations composed of natives having a common heritage and sharing common interests to receive and use settlement funds and benefits.[1] The ANCSA has one overriding purpose, namely, to clear title, through congressional action, to all lands within Alaska by the settlement of all aboriginal land titles and land claims,[2] and avoid the creation of a reservation system, wardship, or trusteeship.[3]

The ANCSA limits litigation challenging the elimination of Native Alaskan land claims.[4] However, petitions by Alaska Native tribes to have land taken into trust pursuant to the Indian Reorganization Act were not claims prohibited by the ANCSA provision extinguishing all claims of aboriginal right, title, use, or occupancy of land.[5]

Footnotes

1 43 U.S.C.A. §§ 1601 et seq.
As to the arbitration of regional boundary disputes, see 43 U.S.C.A. § 1606(a).
All conveyances made by reason of the Alaska National Interest Lands Conservation Act are subject to the ANCSA, but the ANCSA does not affect eligibility determinations. Stratman v. Leisnoi, Inc., 545 F.3d 1161 (9th Cir. 2008).

2 Bay View, Inc. v. U.S., 278 F.3d 1259 (Fed. Cir. 2001).

3 Akiachak Native Community v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013), on reconsideration in part on other grounds, 995 F. Supp. 2d 1 (D.D.C. 2013), appeal dismissed, 2014 WL 3014864 (D.C. Cir. 2014).

4 Cook Inlet Region, Inc. v. Rude, 690 F.3d 1127 (9th Cir. 2012), cert. denied, 133 S. Ct. 1814, 185 L. Ed. 2d 814 (2013).

5 Akiachak Native Community v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013), on reconsideration in part on other grounds, 995 F. Supp. 2d 1 (D.D.C. 2013), appeal dismissed, 2014 WL 3014864 (D.C. Cir. 2014).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 77

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

3. Restrictions on Alienation of Indian Lands

§ 77. Prohibition on settling or surveying Indian land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173, 174

A federal statute prohibits the settling or surveying of land belonging, secured, or granted by treaty with the United States to an Indian tribe.[1] In this connection, the treaty is notice that the land is held for the use of the Indians, and this purpose cannot be defeated by any action of officers of the Department of the Interior.[2]

Footnotes

1 25 U.S.C.A. § 180.

2 U.S. v. Carpenter, 111 U.S. 347, 4 S. Ct. 435, 28 L. Ed. 451 (1884).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 78

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

3. Restrictions on Alienation of Indian Lands

§ 78. Indian Nonintercourse Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 173, 174

A.L.R. Library

Construction and Application of Non-Intercourse Act, Codified at 25 U.S.C.A. s177, and Predecessor Enactments Barring Conveyances of Tribal Land to Non-Indians Unless Made or Ratified by Congress, 73 A.L.R. Fed. 2d 221

The Indian Nonintercourse Act (INA) provides that no purchase, grant, lease, or other conveyance of lands from any Indian nation or tribe of Indians will be valid unless made by treaty or convention entered into pursuant to the Constitution.[1] The INA applies to Indian lands throughout the United States[2] but applies only to "tribal land," not to "allotted land" owned by individual Indians and held in trust by the federal government.[3]

Caution:

The statutory requirements of the INA governing the sale or transfer of Indian lands may not be waived, and a conveyance in violation of statute does not create any rights.[4] A grant of authority to the Secretary of Interior to approve contracts encumbering Indian lands does not authorize the Secretary to approve conveyances prohibited by the INA.[5]

The purpose of the INA is to prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress.[6]

An Indian tribe may bring an action to establish an Indian tribe's right to land allegedly conveyed in violation of the INA,[7] and an Indian tribe's right of action under federal common law for the use and occupation of land conveyed in 1795 without the consent of the United States is not preempted by the INA.[8] The plaintiff must show that: (1) the parcels of land at issue are covered by the statute as tribal land; (2) the United States has never consented to the alienation of the tribal land; and (3) the trust relationship between the United States and the tribe, which is established by coverage of the INA, has never been terminated or abandoned.[9] The INA did not apply when the tribe's claim of aboriginal title to land was extinguished by an individual's purchase of the land from the tribe and reconveyance to an individual member of the tribe[10] or when the tribe's aboriginal title was extinguished by treaty vesting title in the state.[11]

Footnotes

1 25 U.S.C.A. § 177.

2 Oneida Indian Nation of N. Y. State v. Oneida County, New York, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); Mohegan Tribe v. State of Conn., 638 F.2d 612 (2d Cir. 1980).

3 San Xavier Development Authority v. Charles, 237 F.3d 1149 (9th Cir. 2001).

4 Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S., 672 F.3d 1021 (Fed. Cir. 2012).

5 Chemehuevi Indian Tribe v. Jewell, 767 F.3d 900 (9th Cir. 2014).

6 Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960); Bay Mills Indian Community v. State, 244 Mich. App. 739, 626 N.W.2d 169 (2001).

7 Mashpee Tribe v. Watt, 542 F. Supp. 797 (D. Mass. 1982), judgment aff'd, 707 F.2d 23 (1st Cir. 1983); Bay Mills Indian Community v. State, 244 Mich. App. 739, 626 N.W.2d 169 (2001).
Claims by individual Indians may not be heard under the INA. Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012); U.S. v. 43.47 Acres of Land, More or Less, Situated in County of Litchfield, Town of Kent, 896 F. Supp. 2d 151 (D. Conn. 2012), aff'd, 595 Fed. Appx. 32 (2d Cir. 2014).

8 Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985).

9 Delaware Nation v. Pennsylvania, 446 F.3d 410 (3d Cir. 2006), as amended, (June 14, 2006); U.S. v. 43.47 Acres of Land, More or Less, Situated in County of Litchfield, Town of Kent, 896 F. Supp. 2d 151 (D. Conn. 2012), aff'd, 595 Fed. Appx. 32 (2d Cir. 2014).

10 Delaware Nation v. Pennsylvania, 446 F.3d 410 (3d Cir. 2006), as amended, (June 14, 2006).

11 Seneca Nation of Indians v. New York, 382 F.3d 245 (2d Cir. 2004).

41 Am. Jur. 2d Indians; Native Americans § 79

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

E. Alienation of Indian Lands; Acquisition by Federal Government

3. Restrictions on Alienation of Indian Lands

§ 79. Allotment restrictions on alienation of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 175

Indian allotments held in trust by the United States, and allotments held in fee by individual Indians and subject to restraints on alienation and reversionary interests in the United States,[1] are to be treated identically as to congressional control and limitations on alienability.[2] Restrictions against alienation imposed on an Indian allotment of land may be of such a nature that they run with the land and are applicable to the allottee's heirs as well as to the allottees,[3] or they may be limited to the lifetime of the allottee or directed only against conveyances made by the allottee personally.[4] The restrictions generally do not embrace non-Indians who are not under the protection of the United States,[5] but the government can make them binding upon persons other than Indians to fulfill the government's protective policy.[6]

In determining whether a restriction on alienability of Indian allotments is personal, and therefore operative only on the allottee, or runs with the land and thus binds the heirs as well, not only must the legislative intention of Congress be considered[7] but also the status and interest of the Indians affected.[8]

When Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims under a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.[9]

Footnotes

1 U.S. v. Stands, 105 F.3d 1565 (8th Cir. 1997); U.S. v. City of Tacoma, Wash., 332 F.3d 574 (9th Cir. 2003).

As to the allotment of Indian land, generally, see §§ 67 to 69.

2 U.S. v. City of Tacoma, Wash., 332 F.3d 574 (9th Cir. 2003).

3 U.S. v. Reily, 290 U.S. 33, 54 S. Ct. 41, 78 L. Ed. 154 (1933); U.S. v. Bowling, 256 U.S. 484, 41 S. Ct. 561, 65 L. Ed. 1054 (1921).

4 Stewart v. Keyes, 295 U.S. 403, 55 S. Ct. 807, 79 L. Ed. 1507 (1935).

5 Levindale Lead & Zinc Min. Co. v. Coleman, 241 U.S. 432, 36 S. Ct. 644, 60 L. Ed. 1080 (1916).

6 Sage v. Hampe, 235 U.S. 99, 35 S. Ct. 94, 59 L. Ed. 147 (1914).

7 Bowling v. U.S., 233 U.S. 528, 34 S. Ct. 659, 58 L. Ed. 1080 (1914).

8 U.S. v. Reily, 290 U.S. 33, 54 S. Ct. 41, 78 L. Ed. 154 (1933).

9 South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986); Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Tp., 2002 ND 83, 643 N.W.2d 685 (N.D. 2002).

End of Document

41 Am. Jur. 2d Indians; Native Americans VI F Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

F. Roads and Rights-of-Way on Indian Lands

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 187

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 187

End of Document

41 Am. Jur. 2d Indians; Native Americans § 80

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

F. Roads and Rights-of-Way on Indian Lands

§ 80. General authority for roads and rights-of-way on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 187

Forms

Federal Procedural Forms § 41:30 (Allegation in complaint in district court—Unlawful use of right-of-way without Indian tribe's consent [25 U.S.C.A. §§ 323, 324; 28 U.S.C.A. § 1362; 25 C.F.R. § 169.3; Fed. R. Civ. P. 8(a)])

The Secretary of the Interior is authorized by statute to grant permission to the proper state or local authorities for the opening and establishment of public highways through any Indian reservation or lands allotted but not conveyed with full power of alienation.[1] Similar provisions apply to a right-of-way for a railway, telegraph, and telephone line, on compliance with statutory requirements,[2] and to rights-of-way through Indian reservations for power and communications facilities[3] and pipelines.[4]

The Secretary is empowered to grant rights-of-way for all purposes over and across any lands held in trust by the federal government for Indians or Indian tribes, communities, bands, or nations, or any lands owned, subject to restrictions against alienation, and any other lands acquired or set aside for the use and benefit of the Indians.[5] The consent of the proper tribal officials is required for a grant of a right-of-way over lands belonging to organized tribes, and rights-of-way over lands of individual Indians may be granted without the consent of the individual owner only under specified statutory conditions.[6]

Observation:

A tribe's grant of a state highway right-of-way on reservation land does not transfer ownership of the reservation land to the state; the land remains part of the reservation and within tribal jurisdiction.[7] The principle applies as well to railroad rights-of-way on restricted Indian lands[8] or on the reservation.[9]

Caution:

The consent of the Secretary of the Interior to the granting of a right-of-way across Indian land is a requirement which may not be circumvented by initiating an action for a grant of a right-of-way in the tribal court, which has no jurisdiction over such actions.[10]

CUMULATIVE SUPPLEMENT

Statutes:

25 C.F.R. Pt. 169 (25 C.F.R. §§ 169.1 to 169.415) was revised effective December 21, 2015, and former 25 C.F.R. § 169.23 was removed. As to the process for rights of way applications within or overlapping existing rights of way, or piggybacking, see 25 C.F.R. § 169.127.

25 C.F.R. Pt. 169 (25 C.F.R. §§ 169.1 to 169.415) was revised effective December 21, 2015, and former 25 C.F.R. §§ 169.26, 169.27 were removed. As to whether a right of way is required for service lines, see 25 C.F.R. § 169.51.

[END OF SUPPLEMENT]

Footnotes

1 25 U.S.C.A. § 311.
As to regulations regarding the rights-of-way over Indian lands, see 25 C.F.R. §§ 169.1 et seq.
The free exercise of religion under the First Amendment does not forbid the federal government from permitting the construction of a road through a portion of a National Forest traditionally used by for religious purposes by members of three Indian tribes. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).
A state's federally granted highway right-of-way over tribal lands with the tribe's consent and the payment of just compensation is valid. Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008).

A state public highway cannot be established on section lines bordering Indian trust and allotted lands without approval of the Secretary and due compensation. Calhoon v. Sell, 71 F. Supp. 2d 990 (D.S.D. 1998).

2 25 U.S.C.A. §§ 312, 319.

As to regulations regarding railroad rights-of-way over Indian lands, see 25 C.F.R. §§ 169.23, 169.24.

Treaty limitations do not apply to a proposed railroad line when it does not pass through any present-day reservation and does not require any cession of reservation land. Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003).

The statute is not a grant to railroad companies of the power of eminent domain. Southern Pacific Transp. Co. v. Watt, 700 F.2d 550 (9th Cir. 1983).

3 43 U.S.C.A. § 961.

As to regulations regarding power and communications rights-of-way over Indian lands, see 25 C.F.R. §§ 169.26, 169.27.

4 Am. Jur. 2d, Pipelines § 26.

5 25 U.S.C.A. § 323.

As to the payment and disposition of compensation for such rights-of-way, see 25 U.S.C.A. § 325.

The statute does not create a private right of action for trespass for failure to satisfy the statutory conditions. Begay v. Public Service Co. of N.M., 710 F. Supp. 2d 1161 (D.N.M. 2010).

6 25 U.S.C.A. § 324.

7 State v. Pink, 144 Wash. App. 945, 185 P.3d 634 (Div. 2 2008).

A public roads treaty applicable to lands of a tribal nation created an easement or right-of-way in the state, not fee simple, for purposes of determining that the road is in Indian country. Murphy v. State, 2005 OK CR 25, 124 P.3d 1198 (Okla. Crim. App. 2005).

8 Estoril Producing Corp. v. Murdock, 1991 OK CIV APP 122, 822 P.2d 129 (Ct. App. Div. 2 1991).

9 Burlington Northern R. Co. v. Montana Dept. of Public Service Regulation, Public Service Com'n, 221 Mont. 497, 720 P.2d 267 (1986).

10 Fredericks v. Mandel, 650 F.2d 144 (8th Cir. 1981).

End of Document

41 Am. Jur. 2d Indians; Native Americans VI G Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

G. Water and Irrigation on Indian Lands

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 189, 190

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 189, 190

End of Document

41 Am. Jur. 2d Indians; Native Americans § 81

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

G. Water and Irrigation on Indian Lands

§ 81. Federally reserved water rights on Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 189, 190

The federal government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each such reservation; in so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.[1]

The tribe's reserved water rights are federal rights, not state rights.[2] Although an Indian reservation's federal water right remains subordinate to rights acquired under state law prior to creation of the reservation, it is senior to the claims of all future state appropriators, even those who use the water before the federal holders.[3]

The creation of a federally reserved water right in an Indian reservation is not dependent on beneficial use, and the reservation retains its priority despite nonuse[4] or available alternatives.[5]

Factors to be considered when quantifying an Indian tribe's federally reserved water rights include the tribe's history; tribal culture; the tribal land's geography, topography, and natural resources, including groundwater availability; the tribe's economic base; past water use on the reservation; and the tribe's present and projected future population.[6]

Tribal reserved water rights were susceptible to equitable and practical distribution at the time of a tribal partition and termination by act of Congress included in the division of tribal assets.[7]

Observation:

An agreement settling an Indian tribe's claim to river water rights was within the trial court's approval authority based on the determination that the tribe received more water under the settlement than it could have shown at trial, that the settlement did not materially injure upstream users, and that the rights and remedies of a nonsettling tribe were not affected.[8]

CUMULATIVE SUPPLEMENT

Cases:

Homeland purpose of an Indian reservation to provide Native American people with a permanent home and abiding place, as relevant to establishing implied federal reserved water rights, may be established when evidenced by the documents and circumstances creating a reservation. In re CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322 (Idaho 2019).

Nonparty objectors owning land and water rights near Crow Tribe reservation failed to establish that Crow Water Compact, an agreement to distribute and manage water rights among the United States, the Crow Tribe, and the State of Montana, was unreasonable and would adversely affect their interests; amount of water available to pre–ratification state law rights was protected by Compact, objections to quantification and allocation of water rights were speculative, substantial evidence existed to demonstrate that return flow from Tribal diversions would not reduce the amount of water available downstream, Tribal allocation of water was a result of arms-length negotiations, the Compact did not compromise state-based water rights, and future potential problems that might arise with the administration of water rights under the Compact were speculative. MCA 85–20–901. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584 (2015).

Water Court was not required to apply rule allowing dismissal of action for failure to state a claim for which relief could be granted and accept the truth of allegations in complaint in proceeding in which United States, Indian Tribe, and State submitted Crow Water Compact to Water Court and tribal member allottees objected to Court's preliminary decree; nothing required the Water Court to accept the truth of factual allegations made in an objection to a preliminary decree, and, to the contrary, in water rights matters, a properly filed claim of water right constituted prima facie proof of its content until the issuance of a final decree. MCA 85–2–227(1); Rules Civ.Proc., Rule 12(b)(6). In re Crow Water Compact, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217 (2015).

[END OF SUPPLEMENT]

Footnotes

1 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001).
The tribe's implied water rights vest when the government creates the Indian reservation. Pyramid Lake Paiute Tribe of Indians v. Ricci, 245 P.3d 1145, 126 Nev. Adv. Op. No. 48 (Nev. 2010).
An implied reservation of water is found when necessary to fulfill the purposes of the Indian reservation. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

2 U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005); In re General Adjudication of All Rights to Use Water in Big Horn River System, 2002 WY 89, 48 P.3d 1040 (Wyo. 2002).

Tribes are not required to defend their federally reserved water rights in state administrative proceedings. The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093 (2002).

3 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001).

The tribe's water use rights carry a priority date of time immemorial, taking precedence over alleged rights of subsequent irrigators. Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999), opinion amended on other grounds on denial of reh'g, 203 F.3d 1175 (9th Cir. 2000).

4 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001).

The tribe's implied water rights are not lost by nonuse. Pyramid Lake Paiute Tribe of Indians v. Ricci, 245 P.3d 1145, 126 Nev. Adv. Op. No. 48 (Nev. 2010).

The tribe's reserved water rights cannot be lost by forfeiture, abandonment, failure to perfect, or beneficial use. U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005).

5 Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

6 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001).

7 Ute Distribution Corp. v. Secretary of Interior of the U.S., 624 F. Supp. 2d 1322 (D. Utah 2008), aff'd and remanded on other grounds, 584 F.3d 1275 (10th Cir. 2009).

8 In re General Adjudication of All Rights To Use Water In the Gila River System and Source, 223 Ariz. 362, 224 P.3d 178 (2010).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 82

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

G. Water and Irrigation on Indian Lands

§ 82. Irrigation of Indian lands and regulation of water use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 189, 190

As provided by statute, in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior will prescribe rules and regulations as necessary to secure a just and equal distribution among the Indians residing upon the reservations; further, no other appropriation or grant of water by any riparian proprietor will be authorized or permitted to the damage of any other riparian proprietor.[1]

The government has an obligation to deliver an equitable amount of irrigation water to allotments of leased Indian reservation land provided the lessees make timely payments of operation and maintenance assessments.[2]

Footnotes

1 25 U.S.C.A. § 381.
As to regulations regarding irrigation operation and maintenance on Indian lands, see 25 C.F.R. §§ 171.100 et seq.

2 Oswalt v. U.S., 85 Fed. Cl. 153 (2008).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 83

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VI. Indian Lands

G. Water and Irrigation on Indian Lands

§ 83. Jurisdiction for adjudication of Indian water rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 189, 190

Federal courts have jurisdiction to hear suits by the United States and by Indian tribes seeking the adjudication of Indian water rights,[1] under the jurisdictional provisions of the Indian Allotment Act.[2] By statute,[3] when a civil action is commenced by the United States, as trustee for certain Indian tribes and as owner of various non-Indian government claims, for the adjudication of water rights, a federal district court has original jurisdiction except as otherwise provided by an act of Congress.[4]

Observation:

The McCarran Amendment gives consent to jurisdiction in the state court concurrent with jurisdiction in the federal court over controversies involving Indian water rights held in trust by the United States.[5]

Footnotes

1 Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).

2 25 U.S.C.A. § 345; 28 U.S.C.A. § 1353.

3 28 U.S.C.A. § 1345.

4 Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

5 Am. Jur. 2d, Waters § 29.

End of Document

41 Am. Jur. 2d Indians; Native Americans VII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 197, 198

End of Document

41 Am. Jur. 2d Indians; Native Americans § 84

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 84. Role of tribal law, state law, and Interior Secretary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Indian tribes generally retain their inherent power over rules of inheritance for members.[1] Under the Indian General Allotment Act (IGAA),[2] the descent and distribution of Indian allotments generally is according to the law of the state or territory where the allotted land is located,[3] subject to specific exclusions from the IGAA for certain tribes.[4] For a deceased allottee of the Five Civilized Tribes, the law of the State of Oklahoma applies to heirship determinations.[5]

The IGAA also requires the approval of the Secretary of the Interior for certain dispositions of allotted land,[6] and for Indians with trust property, the Secretary is required by statute[7] to assume the general role of the executor or administrator of a decedent's estate and to prosecute the decedent's surviving claims.[8]

Under the Indian Land Consolidation Act (ILCA), any Indian tribe may adopt a tribal probate code to govern descent and distribution of trust or restricted lands that are: (1) located within that Indian tribe's reservation; or (2) otherwise subject to the jurisdiction of that Indian tribe.[9] A tribal probate code may include: (1) rules of intestate succession; and (2) other tribal probate code provisions that are consistent with federal law.[10] The ILCA also provides that any tribal probate code, and any amendment to a tribal probate code, is subject to the approval of the Secretary of the Interior.[11] The ILCA also sets out certain rules of descent that apply in the case of a trust or restricted interest in land or interest in trust personalty to which a tribal probate code does not apply,[12] as well as provisions governing testamentary dispositions of interests in a trust or restricted land.[13]

The Secretary, in carrying out the responsibility to regulate the descent and distribution of trust or restricted or controlled Indian lands, must give full faith and credit to tribal actions pursuant to the provisions of the ILCA for tribal probate codes.[14]

Footnotes

1 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (recognizing rule); Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009) (recognizing rule); Cossey v. Cherokee Nation Enterprises, LLC, 2009 OK 6, 212 P.3d 447 (Okla. 2009) (overruled on other grounds by, Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 (Okla. 2013)) (recognizing rule).

2 §§ 67 to 69.

3 25 U.S.C.A. §§ 348, 349.

4 25 U.S.C.A. § 339.

5 § 93.

6 25 U.S.C.A. § 373.

7 25 U.S.C.A. §§ 371 to 380.

8 Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987).

9 25 U.S.C.A. § 2205(a)(1).
As to regulations governing tribal probate codes, see 25 C.F.R. §§ 18.1 et seq.

10 25 U.S.C.A. § 2205(a)(2).
As to intestate succession of Indian lands, see §§ 87, 88.
As to disposition of Indian lands by will or devise, see § 88.

11 25 U.S.C.A. § 2205(b); 25 C.F.R. §§ 18.201 et seq.

12 25 U.S.C.A. § 2206(a)(1)(B).

13 25 U.S.C.A. § 2206(b).

14 25 U.S.C.A. § 2207.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 85

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 85. Role of tribal law, state law, and Interior Secretary—Children born-out-of-wedlock

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

For the purpose of determining the descent of land to the heirs of any deceased Indian land allottee,[1] when a male and female Indian have cohabitated as husband and wife according to the custom and manner of Indian life, their issue are legitimate issue, and every Indian child who would otherwise be considered illegitimate must be considered the legitimate issue of the father.[2] An Indian child within this provision is not required to satisfy a state law of legitimacy.[3]

In contrast, when a specific Indian Settlement Act applies to render state law controlling, state law applies to determine the marital status of Indian parents and hence the legitimacy of their children for purposes of an heirship determination even though the generally applicable federal law and Indian custom would require a different result.[4] The exclusion of certain children born-out-of-wedlock as heirs under the White Earth Land Settlement Act incorporating state law is not a violation of due process.[5]

Footnotes

1 25 U.S.C.A. § 348.

2 25 U.S.C.A. § 371 (excluding the Cherokee Outlet lands).

3 Osborne v. Babbitt, 61 F.3d 810 (10th Cir. 1995).

4 Smith v. Babbitt, 96 F. Supp. 2d 907 (D. Minn. 2000).

5 Shangreau v. Babbitt, 68 F.3d 208 (8th Cir. 1995).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 86

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 86. Jurisdiction of Indian probate action

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Forms

Federal Procedural Forms § 41:41 (Notice of hearing in probate proceeding [25 U.S.C.A. § 372; 43 C.F.R. § 4.323])

Federal law[1] vests in the Secretary of the Interior exclusive jurisdiction over estate and probate proceedings respecting descent and distribution of the assets of an Indian.[2] The State is precluded by federal preemption and the exercise of plenary power of the United States over Indian tribes from exercising jurisdiction in Indian estate and probate matters.[3]

Federal regulations provide for the probate of estates by the Court of Indian Offenses.[4]

A state court cannot exercise jurisdiction over the probate of a Indian tribe member's estate, when the member is an enrolled member of the tribe, the entire estate is located within the exterior boundaries of the tribal reservation at the time of the member's death, all parties to the probate case are member Indians, and the tribe has not consented to the State's assumption of civil jurisdiction pursuant to procedures outlined in federal and state statutes.[5]

Federal courts may review challenges to Indian probate proceedings.[6]

Footnotes

1 25 U.S.C.A. § 372; 25 C.F.R. §§ 15.1 et seq.
As to jurisdiction for estates of members of the Five Civilized Tribes, see § 93.

2 In re Frank-Hill, 300 B.R. 25 (Bankr. D. Ariz. 2003).

3 In re Frank-Hill, 300 B.R. 25 (Bankr. D. Ariz. 2003).

4 25 C.F.R. §§ 11.700 to 11.713.

5 In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).

6 Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Anderson v. Babbitt, 230 F.3d 1158 (9th Cir. 2000).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 87

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 87. Intestate succession of Indian lands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Federal regulations provide for the distribution of intestate estates by the Court of Indian Offenses.[1]

The rules of intestate succession under the Indian Land Consolidation Act[2] are made applicable to land for which patents have been executed and delivered under the Indian General Allotment Act (IGAA).[3] Generally, subject to any applicable federal law relating to the devise or descent of trust or restricted property, any trust or restricted interest in land or interest in trust personalty that is not disposed of by a valid will descends according to an applicable approved tribal probate code[4] or, in the case of a trust or restricted interest in land or interest in trust personalty to which a tribal probate code does not apply, descends as specifically provided.[5] Additional provisions apply to the intestate descent of permanent improvements.[6]

When an Indian whose allotment has not yet been patented free of restrictions dies without having made a valid will, the Secretary of the Interior must ascertain the legal heirs.[7]

Observation:

In certain instances of intestacy without heirs, the intestate Indian's estate escheats either to the tribe or to the United States.[8]

Footnotes

1 25 C.F.R. § 11.711(b).

2 25 U.S.C.A. § 2206(a).

3 25 U.S.C.A. § 348.

4 25 U.S.C.A. § 2206(a)(1)(A).

5 25 U.S.C.A. § 2206(a)(1)(B).

6 25 U.S.C.A. § 2206(a)(2).

7 25 U.S.C.A. § 372.

8 25 U.S.C.A. §§ 373a, 373b.
As to the escheat of Indian lands, generally, see Am. Jur. 2d, Escheat § 8.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 88

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 88. Disposition of Indian lands by will or devise

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

An Indian's will is valid only if it is approved by the Secretary of the Interior, either before or after the death of the testator,[1] and the Secretary can only approve those Indian wills that devise trust property in accordance with any restrictions on alienation imposed by statute.[2]

Any persons of the age of 18 years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States may, prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, dispose of such property by will[3] in accordance with the testamentary disposition provisions of the Indian Land Consolidation Act (ILCA)[4] or a tribal probate code approved under the ILCA and regulations to be prescribed by the Secretary.[5]

Observation:

A will must be construed to apply to all trust and restricted land and trust personalty which the testator owned at death, including any such land or personalty acquired after the execution of the will.[6] Except as otherwise expressly provided in the will, a devise of a trust or restricted interest in a parcel of land will be presumed to include the interest of the testator in any permanent improvements attached to the parcel of land[7] even though the covered permanent improvement is not held in trust and without altering or otherwise affecting the nontrust status of such a covered permanent improvement.[8]

Caution:

Subject to certain exceptions under the ILCA, the Secretary may not approve a tribal probate code, or an amendment to such a code, that prohibits the devise of an interest in trust or restricted land to: (1) an Indian lineal descendant of the original allottee; or (2) an Indian who is not a member of the Indian tribe with jurisdiction over such an interest.[9]

Footnotes

1 25 U.S.C.A. § 373.

2 Cultee v. U.S., 713 F.2d 1455 (9th Cir. 1983).
As to review of the Secretary's determinations, see § 90.

3 25 U.S.C.A. § 373.

4 25 U.S.C.A. § 2206(b).

5 25 U.S.C.A. § 373.
As to the probate of Indian estates, except for the Osage Nation and the Five Civilized Tribes, see 25 C.F.R. §§ 15.1 et seq.

6 25 U.S.C.A. § 2206(h)(1)(A).

7 25 U.S.C.A. § 2206(h)(1)(B).

8 25 U.S.C.A. § 2206(h)(1)(C).

9 25 U.S.C.A. § 2205(a)(3).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 89

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 89. Determination of Indian allotment heirs by Interior Secretary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Forms

Federal Procedural Forms § 41:42 (Decision of administrative-law judge—Findings, conclusions, and order [25 U.S.C.A. § 372])

When any Indian to whom an allotment of land has been made or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of the allotment as provided, the Secretary of the Interior, upon notice and hearing, must ascertain the legal heirs of the decedent[1] under the Indian Land Consolidation Act (ILCA)[2] or a tribal probate code approved under the ILCA.[3] The Secretary's decision is subject to judicial review to the same extent as determinations made in connection with the approval of wills.[4]

For a deceased allottee of the Five Civilized Tribes, the law of the State of Oklahoma applies to heirship determinations.[5]

Practice Tip:

The United States is not a necessary or indispensable party to any proceeding to determine the heirship of a deceased Indian allottee.[6]

Footnotes

1 25 U.S.C.A. § 372.

2 25 U.S.C.A. §§ 2201 et seq.

3 25 U.S.C.A. § 372.

4 25 U.S.C.A. §§ 372, 373.
As to review of the Secretary's approval of wills, see § 90.

5 § 93.

6 Shade v. Downing, 333 U.S. 586, 68 S. Ct. 702, 92 L. Ed. 894 (1948).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 90

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 90. Review of Interior Secretary's approval of Indian will

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Forms

Federal Procedural Forms § 41:46 (Notice—Of right to appeal decision of administrative-law judge [25 U.S.C.A. § 372; 43 C.F.R. §§ 4.320, 4.321, 4.323])

Federal Procedural Forms § 41:51 (Allegation in complaint in district court—Challenging administrative heirship determination [5 U.S.C.A. §§ 701 et seq.; 25 U.S.C.A. §§ 372, 373; 28 U.S.C.A. § 1331; Fed. R. Civ. P. 8(a)])

The Interior Secretary's decision as to the validity of an Indian's will[1] is subject to judicial review for an abuse of discretion,[2] or failure to exercise discretion,[3] including de novo review for errors of law,[4] provided the appeal is taken in a timely manner.[5] The Secretary does not have discretion to disapprove a rational testamentary disposition[6] and may not act solely based on discretionary subjective feelings that the estate disposition is not just and equitable.[7]

A federal district court has federal question jurisdiction over a complaint against the Secretary attacking the statutory disapproval of an Indian's will.[8]

Findings of the Secretary supported in the record cannot be successfully challenged under state law.[9]

On judicial review of a determination of an administrative law judge approving the will of a deceased Indian, the petitioner bears the burden of proof.[10]

CUMULATIVE SUPPLEMENT

Cases:

Internal agency memorandum written by Assistant Solicitor of Interior, who asserted that Alaska Native regional and village corporations (ANC) must be exempt from Indian Self-Determination and Education Assistance Act's (ISDA) recognition clause to avoid statutory surplusage, was not entitled to *Skidmore* deference in action challenging Treasury Secretary's determination that ANCs were eligible for emergency aid set aside for Tribal governments under Coronavirus Aid, Relief, and Economic Security (CARES) Act; memorandum did not address any textual or historical considerations and appeared inconsistent with binding regulation adopted by Treasury Department. 25 U.S.C.A. § 5304(e); 42 U.S.C.A. § 801; 12 C.F.R. § 1805.104. Confederated Tribes of the Chehalis Reservation v. Mnuchin, 976 F.3d 15 (D.C. Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 § 88.

2 Tooahnippah v. Hickel, 397 U.S. 598, 90 S. Ct. 1316, 25 L. Ed. 2d 600 (1970).
As to the Indian General Allotment Act references to judicial review of the Secretary's approval of wills, see 25 U.S.C.A. §§ 372, 373.

3 Akers v. Morton, 499 F.2d 44 (9th Cir. 1974).

4 Crawley v. U.S. ex rel. Lujan, 977 F.2d 1409 (10th Cir. 1992).

5 Mammedaty v. Kleppe, 412 F. Supp. 283 (W.D. Okla. 1976).

6 Akers v. Morton, 499 F.2d 44 (9th Cir. 1974).

7 Tooahnippah v. Hickel, 397 U.S. 598, 90 S. Ct. 1316, 25 L. Ed. 2d 600 (1970).

8 Tooahnippah v. Hickel, 397 U.S. 598, 90 S. Ct. 1316, 25 L. Ed. 2d 600 (1970).

9 Akers v. Morton, 499 F.2d 44 (9th Cir. 1974).

10 Lewis v. Andrus, 512 F. Supp. 1096 (E.D. Wash. 1981).

41 Am. Jur. 2d Indians; Native Americans § 91

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

A. In General

§ 91. Actions to compel Interior Secretary to commence probate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

Forms

Federal Procedural Forms § 41:52 (Allegation in complaint in district court—Failure to commence probate proceedings was abuse of discretion [5 U.S.C.A. §§ 701 et seq.; 25 U.S.C.A. § 372; 28 U.S.C.A. §§ 1331, 1361, 2201; Fed. R. Civ. P. 8(a)])

The federal district court has jurisdiction over an action in the nature of mandamus to compel the Department of the Interior and Bureau of Indian Affairs officials to commence the probate of the trust estates of Indians who have died or will die possessed of trust property on a reservation.[1]

Footnotes

1 Dull Knife v. Morton, 394 F. Supp. 1299 (D.S.D. 1975).

41 Am. Jur. 2d Indians; Native Americans VII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

A.L.R. Library

A.L.R. Index, Indians
West's A.L.R. Digest, Indians 197, 198

End of Document

41 Am. Jur. 2d Indians; Native Americans § 92

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

§ 92. Applicable law to determine Indian heirs and distribution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

For a deceased allottee of the Five Civilized Tribes who dies leaving restricted heirs, the law of the State of Oklahoma applies to heirship determinations.[1]

When the estate of any deceased restricted Indian, enrolled or unenrolled, of the Five Civilized Tribes of Oklahoma, whose restricted estate consists only of funds or securities under the control of the Department of the Interior of an aggregate value not exceeding $2,500 and who dies after December 24, 1942, the distribution of all such funds and securities, including tribal funds, will be effected in accordance with the statute of descent and distribution of the State of Oklahoma.[2]

Observation:

In certain instances of intestacy without heirs, owning trust or restricted Indian lands in Oklahoma or an interest or profits, the intestate Indian's lands, interests, or profits escheat to the tribe.[3]

The Indian General Allotment Act states that its provisions do not extend to territory occupied by designated tribes in Oklahoma[4] nor to the Five Civilized Tribes in Oklahoma.[5]

Footnotes

1 25 U.S.C.A. § 375.
As to regulations governing the estates of Indians of the Five Civilized Tribes, see 25 C.F.R. §§ 16.1 et seq.

2 25 U.S.C.A. § 375a.

3 25 U.S.C.A. § 375d.
As to the escheat of Indian lands, generally, see Am. Jur. 2d, Escheat § 8.

4 25 U.S.C.A. § 339.

5 25 U.S.C.A. § 353.

End of Document

41 Am. Jur. 2d Indians; Native Americans § 93

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

§ 93. Jurisdiction to determine Indian heirs and distribution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

The jurisdiction to determine the heirs of any deceased citizen allottee of the Five Civilized Tribes who dies leaving restricted heirs is conferred on the probate court of the State of Oklahoma.[1] It is improper for the United States Claims Court to accept jurisdiction of a case involving the question of who are the restricted heirs of a deceased Indian Oklahoma resident before an Oklahoma state court determines the question.[2]

The statute does not apply if all the heirs are unrestricted[3] but if the deceased allottee leaves both restricted and unrestricted heirs, the state court has jurisdiction to determine the heirs.[4]

Exclusive jurisdiction is conferred on the Secretary of the Interior to determine the heirs after notice and hearing under such rules and regulations as the Secretary may prescribe and to probate the estate of any deceased restricted Indian, enrolled or unenrolled, of the Five Civilized Tribes of Oklahoma whenever the restricted estate consists only of funds or securities under the control of the Department of the Interior of an aggregate value not exceeding $2,500.[5] The Secretary is granted authority to disburse to the heirs or legatees of deceased members of the Five Civilized Tribes any sum of money on deposit to the credit of such deceased Indian or Indians, not exceeding $500, when the decedent died seized of no lands or the lands have since been lawfully alienated.[6]

When the state court of Oklahoma has jurisdiction, it acts as a federal agency in proceedings under the statute, and state practice contrary to the provisions of the statute does not apply.[7] State courts derive their authority from the federal statute irrespective of the state constitution, and a purchaser of restricted lands agrees to the exercise of such judicial power.[8]

Observation:

State courts of Oklahoma do not have jurisdiction in any matter wherein the title or boundaries of land may be in dispute or question.[9]

Jurisdiction is not defeated by the pendency of proceedings in other courts to determine heirs[10] or to administer the estate.[11] When the fact of heirship is necessary for the determination of actions pending in another court, the other court may determine this fact and need not stay its hand until the state court has acted.[12]

Footnotes

1 25 U.S.C.A. § 375.

2 Fields v. U. S., 191 Ct. Cl. 191, 423 F.2d 380 (1970).

3 In re Micco's Estate, 59 F. Supp. 434 (E.D. Okla. 1945).

4 Moore v. Jefferson, 1942 OK 10, 190 Okla. 67, 120 P.2d 983 (1942).

5 25 U.S.C.A. § 375a.

6 25 U.S.C.A. § 375c.

7 In re Fulsom's Estate, 1929 OK 554, 141 Okla. 300, 285 P. 13 (1929); In re Jackson's Estate, 1926 OK 146, 117 Okla. 151, 245 P. 874 (1926).

8 Owens v. Kitchens, 1924 OK 1136, 105 Okla. 88, 232 P. 797 (1924).

9 In re Micco's Estate, 59 F. Supp. 434 (E.D. Okla. 1945).

10 Roberts v. Anderson, 66 F.2d 874 (C.C.A. 10th Cir. 1933).

11 March v. Peter, 1936 OK 678, 179 Okla. 207, 64 P.2d 912 (1936).

12 Roberts v. Anderson, 66 F.2d 874 (C.C.A. 10th Cir. 1933).

41 Am. Jur. 2d Indians; Native Americans § 94

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

§ 94. Removal of Indian probate action to federal court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

A petition to probate an Indian's will is removable to federal court for an estate of a member of the Five Civilized Tribes that consists in whole or in part of land restricted against alienation and the decedent is survived by Indian heirs.[1] When suits are removed to the federal district court and consolidated with heirship proceedings also brought in the state court, the federal district court possesses all of the equity jurisdiction which existed in the state courts from which the cases were removed.[2] On the attachment of federal district court jurisdiction by removal, jurisdiction is not divested by a plaintiff's reply disclaiming any interest in allotted lands or the interests of restricted heirs.[3]

Footnotes

1 Berry v. Brokeshoulder, 162 F.2d 651 (C.C.A. 10th Cir. 1947).

2 U.S. v. Anglin & Stevenson, 145 F.2d 622 (C.C.A. 10th Cir. 1944).

3 Walker v. Spencer, 123 F.2d 347 (C.C.A. 10th Cir. 1941).

End of Document

41 Am. Jur. 2d Indians; Native Americans § 95

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

§ 95. Conclusiveness of Indian heirs determination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

A determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by a court of the State of Oklahoma having jurisdiction to settle the estate, is conclusive of the question.[1]

Footnotes

1 25 U.S.C.A. § 375.

41 Am. Jur. 2d Indians; Native Americans § 96

American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans
Lonnie E. Griffith, Jr., J.D.

VII. Descent and Distribution Among Indians and Tribes

B. Estates of Members of Five Civilized Tribes

§ 96. Appeal of Indian heirs determination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 197, 198

An appeal from the Oklahoma state court may be taken in the manner and in the court provided by law in cases of appeal in probate matters generally.[1] However, the judgment of a Oklahoma state court on the question of heirship of a deceased member of the Five Civilized Tribes will not be disturbed if it is not against the clear weight of the evidence.[2]

In an Oklahoma state court proceeding to determine the heirs of a deceased allottee of Indian tribal lands which is removed to the federal district court, there is a strong presumption in favor of the trial court's findings of fact as to next of kin, and these findings must be sustained when amply supported by substantial evidence.[3]

Footnotes

1 25 U.S.C.A. § 375.

2 In re Morrison's Estate, 1937 OK 709, 181 Okla. 380, 74 P.2d 1161 (1937).

3 Scott v. Beams, 122 F.2d 777 (C.C.A. 10th Cir. 1941).

End of Document